Supreme Court, U. S.
FILED
AUG 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-78-311

RODNEY D. DRIVER, *et al.*,

Petitioners,

—v.—

RICHARD HELMS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In The

Supreme Court of the United States

October Term, 1978

No. 78 -

Rodney D. Driver, et al.,

Petitioners,

vs.

Richard Helms, et al.,

Respondents.

Petition For a Writ of Certiorari
to the United States Court
of Appeals for the First Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 25, 1978.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is unreported. It is set out in the Appendix, infra, pp. 1a-20a. The opinion of the United States District Court for the Dis-

trict of Rhode Island is reported at 74 F.R.D. 382, and is set out in the Appendix, infra, pp. 21a-69a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether, in a suit for money damages for injuries caused by constitutional torts committed during the course of the defendants' federal employment, 28 U.S.C. §1391(e) grants a federal district court personal jurisdiction over the two following classes of defendants even though they are served outside the State, and were never physically present within the State, in which the district court sits:

1. defendants no longer employed by the United States;

2. defendants who are still employed by the United States, but who are not "serving the government in the capacity in which they performed the acts on which their alleged liability is based."

Statute Involved

Title 28 U.S.C. §1391(e):

> (e) A civil action in which a defendant is an officer or employee of the United States or any agency therof acting in his official capacity or under

> color of legal authority, or an agency of the United States, or the United States, may except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

Statement of the Case

This class-action suit 1/ for damages was filed by petitioners in 1975 in the

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1/ The district court certified the suit as a class-action under Rule 23(b)(3), F.R.Civ. P., App., infra, p.68a.

federal district court for Rhode Island. The damages sought were the result of injuries inflicted by a secret CIA Project entitled HTLINGUAL, carried on from 1953 to 1973, in which the CIA, without warrants ever being issued or applied for, secretly opened, read and circulated approximately 215,000 pieces of incoming and outgoing first-class mail. 2/

The twenty-five defendants in the suit are present or former high-ranking officials of the CIA, the Post Office Department, and other agencies of the United States who were responsible for, participated in, or concealed the mail-opening program. 3/ With the exception of one of the defendants who lives in Rhode Island and was personally served there, the other defendants were served outside the State. The defendants in government service were served by certified mail; those no longer in government service were served personally. 4/

2/ HTLINGUAL is fully described in the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, Book III, pp. 559 et seq.

3/ The current directors of the CIA and the FBI are named as defendants for purposes of injunctive relief concerning disposition of the records of the mail-opening project. The records include copies of all the letters which were opened.

4/ The Court of Appeals' statement that all defendants were served by certified mail (App., infra, p. 2a, n. 4) is incorrect.

All the defendants, save the Rhode Island resident, filed motions to dismiss under Rules 12(b)(2), 12(b)(3) and 12(b)(4), F.R.Civ.P., alleging that they had been served outside the state of Rhode Island and that, indeed, most of them had never been in the State. The plaintiffs conceded the truth of the allegations, since they believed that §1391(e) allowed effective extraterritorial service of process against present and former government officials sued for constitutional torts committed during the course of their employment.

The district court denied the motions to dismiss, agreeing with plaintiffs' interpretation of the extraterritorial reach of §1391(e), both as to defendants in government employment at the time they were served with the summons and complaint in this suit, and as to defendants no longer in government employment when served with process.

The district court certified the question to the First Circuit under 28 U.S.C §1292(b). The Circuit Court took jurisdiction and held that §1391(e) supplies venue and empowers the district court to exercise personal jurisdiction only against officials who, at the time process is served upon them, are "serving the government in the capacity in which they performed the acts on which their alleged liability is based."

Reasons For Granting The Writ

Certiorari should be granted in this case because the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. There is also a conflict

between two Courts of Appeals.

Specifically, the issue raised is the ability of citizens, who are victims of constitutional torts committed by federal employees, to secure effective judicial relief. A construction of 28 U.S.C. §1391(e) which empowers the district courts where plaintiffs reside to exercise jurisdiction over defendants who reside beyond the courts' territorial boundaries, serves that important goal.

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), allows suits for damages by private citizens whose constitutional rights are violated by federal officials. As the Court recognized, such tortious violations possess "a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. The importance of effective relief is, of course, equally great.

One problem to be overcome in many such cases is the distance between the tortfeasors and their victims. Very often, a potential defendant works in the District of Columbia, or in a regional office, both of which will be some distance from the place where their victims live. Section 1391(e), as the court below correctly held to a limited extent, was adopted, at the very least, so that private citizens could conveniently bring suit in the district of their residence against distant officials. A second practical problem to be overcome in some cases - the case at bar being one example - is that because of the passage of time between commission of the tort and its discovery, some tortfeasors have left government employment.

As to the second problem, the court below held that §1391(e) empowered the federal courts to exercise personal jurisdiction, in actions for money damages over federal officials, no matter where they reside, only if, at the time process is served upon them, they are still in government employment and, furthermore, are "serving the government in the capacity in which they performed the acts on which their alleged liability is based." App., infra, p. 6a. That holding eviscerates §1391(e) by requiring private citizens seeking redress for violation of their constitutional rights to sue some wrongdoers in their places of residence, rather than in the jurisdiction where the plaintiff resides. Given the expense of litigation in general, to require plaintiffs to bring suit at a distance from their residence means that suit will often not be brought at all. To that extent, a very effective remedy to vindicate constititutional rights is lost, as is the effect that such suits for damages have in deterring the commission of other constitutional violations. See Bivens v. Six Unknown Agents, supra at 411 (Burger, Ch. J., dissenting).

The Circuit Court's holding that §1391(e) does not grant in personam jurisdiction even over government officials unless they are serving in the same capacity as they were in at the time of the alleged commission of the tort, is an extremely grudging interpretation of the statute which has no support in the cases or the legislative history. Since government employees are promoted through the ranks in the normal course of ther careers, the court's limitation on thelanguage of §1391(e) threatens its

usefulness in a significant way. If the statute has extraterritorial effect at all in constitutional tort cases against government officials, as the Circuit held, there is no logic to support a distinction between allowing service on defendants who remain in the same post throughout their careers, and forbidding service on those who have been promoted, a distinction which the Circuit explicitly left open. App. infra, p. 6a n.11. The district court's thoughtful opinion did not even hint at such a distinction, and there ought to be none. The Court of Appeals for the District of Columbia, construing the same statute, imposed no such limit upon the application of §1391(e) to defendants in government employment. Goodwin v. Briggs, et al., 549 F.2d 1 (D.C. Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3634 (U.S. March 31, 1978)(No. 77-1401). To that extent, there is a split in the Circuits since the District of Columbia Circuit allows effective service upon present employees under §1391(e), regardless of whether the defendant is serving in the "same capacity" as at the time of the commission of the tort.

The district court's view that §1391(e) applies across the board to former officials was the correct interpretation. Other courts have come to the same conclusion. 5/ As

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5/ United States v. McAninch, 435 F. Supp. 240 (E.D.N.Y. 1977), and Lowenstein v. Rooney, 401 F.Supp. 952 (E.D.N.Y. 1975). In the only contrary opinion, Wu. v. Keeney, 384 F.Supp. 1161 (D.D.C. 1974), the court did not have the benefit of any briefing on the point.

the district court below saw it, the question was to "ascertain the Congressional intention in §1391(e). If the plaintiffs' construction would entail a significant added burden on government service, that would be persuasive reason to conclude that Congress would not have taken such a step without comment." 74 F.R.D. at 395; App. infra, p.49a. After examing defendants' alleged burdens, the district court found that there were none of any significance. Ibid. It did not see personal liability for damages as such an added burden on government service, since Bivens already imposes such a burden. Nor did the court think that defense of such cases by former officials was a burden since, as in the case at bar, "it is the policy of the Justice Department to defend lawsuits against present and former officials by citizens claiming redress for actions accomplished under color of legal authority." Ibid. 6/

The First Circuit decision on the point was based only on the absence of legislative history one way or another, and on its view that the use of the present tense in §1391(e) meant that the defendants must be in government employment at the time suit was filed. That too is a very grudging reading of the statute. The statute's liberal purpose is best served by reading it to mean that it applies if the defendandants in government service at the time the constitutional violation occurred. For example,

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6/ In the case at bar, the Justice Department retained private counsel to represent each of the defendants.

in Farmers Elevator Mutual Ins. Co. v. Carl J. Austed & Sons, Inc., 343 F.2d 7, 12 (8th Cir. 1965), the "doing business" requisite of §1391(c) was held to relate to the time when the cause of action arose. This construction was reaffirmed in Great American Ins. Co. v. Louis Lesser Enterprises, Inc., 353 F.2d 997, 1001 (8th Cir. 1965). A similar conclusion was reached in Snyder v. Eastern Auto Distributors, Inc., 357 F.2d 552 (4th Cir. 1966), cert. denied, 384 U.S. 987; in L'Heureux v. Central American Airways Flying Service, Inc., 209 F.Supp. 713, 715 (D. Md. 1962); and in Nelson v. Victory Electric Works, Inc., 210 F. Supp. 954 (1962). Similarly, the provision in the Clayton Act referring to the place where a defendant "transacts business" was held to relate to the time when the cause of action arose. Eastland Construction Company v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1965). Similarly, see Adams Dairy Co. v. National Dairy Products Corp., 293 F.Supp. 1135 (W.D. Mo., W.D. 1968).

A decision concerning the interpretation of §1391(e) is an important question of public law, because if the construction of the First Circuit is upheld, many constitutional violations will go unredressed.

Conclusion

For the reasons set forth above, a petition for certiorari should be granted.

Respectfully submitted,

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August 1978

United States Court of Appeals
For the First Circuit

No. 77-1482

RODNEY D. DRIVER, et al.,

APPELLEES,

v.

RICHARD HELMS, et al.,

APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*

CAMPBELL AND BOWNES, *Circuit Judges.*

Walter H. Fleischer, Donald J. Cohn and *Jacquelin A. Swords,* with whom *Earl Nemser, Cadwalader, Wickersham & Taft, George M. Vetter, Jr., Hinckley, Allen, Salisbury & Parson, Seymour Glanzer, Kenneth Adams, Joel Kleinman, Dickstein, Shapiro & Morin, James V. Kearney, Nancy E. Friedman, Webster & Sheffield, Alan T. Dworkin, Aisenberg & Dworkin, Joseph V. Cavanagh, Higgins, Cavanagh & Cooney, Charles R. Donnenfeld, Cameron M. Blake, Rodney F. Page, Arent, Fox, Kintener, Plotkin & Kahn, Guy J. Wells, Gunning, LaFazia & Gnys, Inc., Alfred F. Belcuore, Cole and Groner, P.C., Harry W. Asquith, Edward W. Moses, Swan, Kenney, Jenckes & Asquith, Wallace L. Duncan, Duncan, Brown, Weinberg & Palmer, Joseph Dailey* and *Breed, Abbott & Morgan* were on briefs, for appellants.

Melvin L. Wulf, with whom *Clark, Wulf & Levine, Burt Neuborne, Richard W. Zacks, Winograd, Shine & Zacks,* and *Joel M. Gora* were on brief, for appellees.

Barbara Allen Babcock, Assistant Attorney General, *Lincoln C. Almond,* United States Attorney, *Robert E. Kopp* and *Paul Blankenstein,* Attorneys, Appellate Section, Civil Division, Department of Justice, on brief for United States, amicus curiae.

May 25, 1978

COFFIN, *Chief Judge.* Plaintiffs-appellees brought this action in 1975 in the federal district court for the district of Rhode Island on behalf of themselves and others similarly situated. Their complaint alleges that the defendants-appellants[1] illegally interfered with their mail, thereby violating appellees' rights under the First, Fourth, Fifth, and Ninth Amendments. The suit seeks damages and declaratory and injunctive relief. Subject matter jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1339, 1343, 1361, and 5 U.S.C. § 702.

Appellants are 25 present or former United States government officials, each sued in his individual and in his official or former official capacity. One of the named plaintiffs, Driver, lives in Rhode Island,[2] but none of the appellants reside in or have substantial contacts with Rhode Island, and the complaint does not allege that any illegal activity occurred in Rhode Island.[3] Therefore, venue is not proper under 28 U.S.C. § 1391(b), and, since none of the appellants were served within Rhode Island,[4] service of process was inappropriate under F. R. Civ. P. 4(f).

Appellees invoke 28 U.S.C. § 1391(e) to support venue and service of process:[5]

> "A civil action in which each defendant is an officer or employee of the United States or any agency

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[1] Other defendants in the case below are not parties to this appeal.

[2] The other named plaintiffs are residents of New York, Minnesota, Connecticut, and California.

[3] The illegal interference with appellees' first-class mail is alleged to have occurred in New York City.

[4] The appellants each were served by certified mail outside Rhode Island.

[5] Appellees also suggested that Rhode Island's long arm statute supplied jurisdiction. R.I. Gen. Laws § 9-5-33 (1956). *See Driver v. Helms*, 74 F.R.D. 382, 400 n. 23 (D. R.I. 1977). This issue is not presented by this appeal.

thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."[6]

Appellants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) (lack of jurisdiction over the person), 12(b)(3) (improper venue), and 12(b)(4) (insufficiency of process). The district court denied these motions, but certified that the questions involved controlling issues of law as to which there is substantial ground for difference of opinion and that an immediate appeal could materially advance the litigation. *Driver* v. *Helms*, 74 F.R.D. 382, 401-02 (D. R.I. 1977). We thus have appellate jurisdiction under 28 U.S.C. § 1292(b).

Appellants argue that 28 U.S.C. § 1391(e), contrary to the holding of the district court, does not give venue to the district court in Rhode Island, does not give the court

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[6] 28 U.S.C. § 1391(e) was amended in 1976. The word "each" was changed to "a" in the first sentence, and the following sentence was added to the end of the first paragraph:

"Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party."

P.L. 94-574, § 3, 90 Stat. 2721 (Oct. 21, 1976).

jurisdiction over the persons of the appellants, and does not authorize the service of process on these appellants. They argue that reliance on § 1391(e) is misplaced because that section does not apply to former officials, does not apply to suits against officials for damages in their individual capacities, and does not independently supply in personam jurisdiction.

THE FORMER OFFICIALS

Ordinarily the plain meaning of the language of a statute is controlling. *See Massachusetts Financial Services, Inc.* v. *Securities Protector Investor Corp.*, 545 F.2d 754, 756 (1st Cir. 1976). Section 1391(e) applies, by its terms, when a "defendant *is* an officer or employee of the United States . . . *acting* in his official capacity or under color of legal authority . . . ." (emphasis added) Because the operative language is in the present tense, we read the section to exclude a defendant who *was* an officer or employee.

"Of course, deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of statutory language when adherence to it would produce an absurd result or 'an unreasonable one "plainly at variance with the policy of the legislation as a whole."' " *Massachusetts Financial Services, supra,* 545 F.2d at 756, *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940), *quoting Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *cf. Natural Resources Defense Counsel* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972) (eschewing the "tyranny of literalness").[7] We do not, however, find any indication in the statute itself or in the legislative

[7] "[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *Culbert*, 46 U.S.L.W. 4259, 4260 n. 4 (U.S. March 28, 1978), *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940).

history that former officials were meant to be included. We are not alone in this conclusion. *See Kipperman* v. *McCone*, 422 F. Supp. 860, 876 (N.D. Cal. 1976); *Wu* v. *Keeney*, 384 F. Supp. 1161, 1168 (D. D.C. 1974).

The cases that have reached a contrary result have decided that excluding former officials would undercut the policies of § 1391(e). *See Driver* v. *Helms, supra*, 74 F.R.D. at 398-400; *United States* v. *McAninch*, 435 F. Supp. 240, 245 (E.D. N.Y. 1977); *Lowenstein* v. *Rooney*, 401 F. Supp. 952, 962 (E.D. N.Y. 1975). We do not think it absurd or plainly at variance with the policies of § 1391(e) to limit it to those who are government officials at the time the action is brought.[8] We are unimpressed by the specter of government officials resigning their positions simply because they fear an action might be brought against them. As the court below noted, resignation would not terminate their liability. *See Driver* v. *Helms, supra*, 74 F.R.D. at 399-400. The most an official could gain would be to avoid venue in the district where a plainitiff lives. A career in government service is, one would think, a disproportionate sacrifice to make for so small a gain. Moreover, we are not persuaded that Congress' desire "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government", H. Rep. No. 536, 87th Cong., 1st Sess. 3 (1961) [hereinafter referred to as House Report], indicates that Congress meant § 1391(e) to provide a net that could draw everyone connected with a governmental action into litigation in a particular district. For instance, those who were never government officials but are defendants in a law suit clearly cannot be

[8] We do not focus on a later time, such as the time when a hearing is held or a decision issued, because the statute speaks to the ability to bring an action. Moreover, if a court were not able to determine venue at the time an action is brought, judicial processes could be thrown into chaos by mobile litigants.

reached by § 1391(e).[9] In fact there is a clear indication in the legislative history that Congress did not mean to reach at least those former officials who have moved away from Washington.[10] Therefore, we reverse the district court as to this point and hold that § 1391(e) does not apply to those defendants who, at the time this action was brought, were not serving the government in the capacity in which they performed the acts on which their alleged liability is based.[11]

PERSONAL DAMAGE ACTIONS

The next issue we must face is whether § 1391(e) applies to actions for damages against officials in their individual capacities. Section 1391(e) was passed, together with 28 U.S.C. § 1361, as the Mandamus and Venue Act of 1962. Before 1962 most actions against federal officials could not be brought outside the District of Columbia. Higher officials residing in Washington were usually indispensable parties against whom venue could not be secured except in Washington. Furthermore, such actions

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[9] That such defendants may exist is indicated by the 1976 amendment. *See* note 6, *supra*.

[10] "This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." H. Rep. No. 536, 87th Cong., 1st Sess. 2 (1961). Prior to 1962 (when the bill was passed) former officials who had moved away from Washington would not have been subject to suit in Washington.

[11] The act is directed at officials "*acting* . . . under color of legal authority". Since official acts expose the officer to expanded venue, and since we have concluded that this exposure terminates when the official leaves office, it would be anomalous to hold that one of the appellants serving the government in a different capacity is nonetheless still exposed to national venue and service of process. As to the act or omission that exposed him to liability, it is only fortuitous that he is still in government. We need not now decide whether someone who has been promoted in the same department is likewise exempted from the operation of § 1391(e).

were often in the nature of mandamus, and federal district courts outside the District of Columbia lacked subject matter jurisdiction over mandamus actions. The crux of appellants' argument is that § 1391(e) should be narrowly construed as a companion to § 1361, designed to combat the specific, relatively narrow problem that spurred Congress to act. That is, they would have us read § 1391(e) to do no more than supply venue in those suits made possible by § 1361, "suits in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Second Circuit has twice followed similar reasoning, but in cases distinguishable from ours. In *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970), the court said that § 1391(e) was aimed at the mischief posed by the inability to review government action outside Washington and that § 1391(e) reached only those who might be subject to compulsion under § 1361. The holding of the case, however, was that the section did not apply to legislators.[12] The court did not have occasion to decide the kinds of civil actions that could be brought against someone to whom § 1391(e) did apply. In *Natural Resources Defense Council* v. *TVA*, *supra*, 459 F.2d at 255, the court said that §§ 1391(e) and 1361 must be read together, *id.* at 258, and that the literal meaning should not necessarily control, *id.* at 257; but the holding was that § 1391(e)'s venue provisions did not apply to the TVA because another statute controlled venue for actions against the TVA. *Id.* at 259. Section 1391(e) states that it applies "except as otherwise provided by law." The court went on to point out that a suit against the TVA could not have been brought in Washington before 1962. *See* House Report, *supra*, at

[12] We do not indicate our views on this holding. *See* note 17, *infra*.

2.[13] In this case the action, at least as against current officials, could have been brought in Washington.

The weakness of the argument, even apart from the fact that it reflects no clear signal from the legislative history discussed below, is that we must interpret the United States Code as it is written. Congress did not limit the application of § 1391(e) to "actions in the nature of mandamus". Rather Congress used the words "[a] civil action in which each defendant is an officer or employee of the United States . . . acting . . . under color of legal authority." The statute does not, by its terms, limit the kind of civil action to which it applies. The case at bar is a civil action. The complaint alleges that the defendant officers of the United States were acting "under color of legal authority". All elements fit — and we deal with a statute speaking in a highly technical field, venue and jurisdiction, where, if anywhere, precision is required.

The plain language of § 1391(e) covers this case, but again we would go beyond the plain language if the result were absurd or plainly at variance with congressional policies. We conclude, after considering such questions, as have many other courts, that § 1391(e) should cover damage actions against officers in their individual capacities.[14] *See Briggs* v. *Goodwin*, 569 F.2d 1 (D.C. Cir. 1977); *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972);

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[13] *See* note 10, *supra*.

[14] The Supreme Court has said that § 1391(e) does not apply to habeas corpus actions, *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n. 4 (1971), but that decision turned on the special nature of habeas corpus actions which though "technically 'civil,' . . . [are] not automatically subject to all the rules governing ordinary civil actions." *See also* the cases cited by the court below. 74 F.R.D. at 391-92.

We might have viewed *Relf* v. *Gasch*, 511 F.2d 804 (D.C. Cir. 1975), as contrary authority, but in *Briggs* v. *Goodwin*, *supra*, 569 F.2d at 6-7, the same circuit confined *Relf's* holding to situations where the alleged wrong was not connected with the defendant's government service.

Driver v. *Helms, supra; United States* v. *McAninch, supra; Lowenstein* v. *Rooney, supra; Patmore* v. *Carlson,* 392 F. Supp. 737, 738 (E.D. Ill. 1975); *Wu* v. *Keeney,* 384 F. Supp. 1161 (D. D.C. 1974); *Green* v. *Laird,* 357 F. Supp. 227 (N.D. Ill. 1973); Hart & Wechsler, The Federal Courts and the Federal System 1388 (1973); 2 Moore, Federal Practice ¶ 4.29, 1210 (1977). *Cf. Kletschka* v. *Driver,* 411 F.2d 436, 442 (2d Cir. 1969) (basing venue on § 1391(b) but adding that § 1391(e) "seems" to apply as well). *But see Kenyatta* v. *Kelly,* 430 F. Supp. 1328, 1330 (E.D. Pa. 1977); *Davis* v. *F.D.I.C.,* 369 F. Supp. 277 (D. Colo. 1974); *Paley* v. *Wolk,* 262 F. Supp. 640 (N.D. Ill. 1965).

The legislative history of § 1391(e) is at best ambiguous, but there are indications that the drafters of the legislation understood that the act might apply to actions such as this one and were not sufficiently bothered by that possibility to prevent it. This act originated as H.R. 10089, 86th Cong., 2d Sess. (1960).[15] That bill was limited to officers acting in their official capacity, and its author, Representative Budge, explained that it was intended to meet the narrow problem described above. Hearing Before the Committee on the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 2-4 (May 26 and June 2, 1960) [hereinafter cited as Hearings].[16] The hearings on the bill before a subcommittee of the Committee on the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrow purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel, stated, "I think what

[15] H.R. 10089 read, in pertinent part:

> "A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides."

[16] The unpublished transcripts of these hearings were submitted to us by appellants, and appellees have not disputed their authenticity. We have verified the authenticity, accuracy, and availability of these transcripts through the office of the General Counsel to the House of Representatives' Committee on the Judiciary.

this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." *Id.* at 32.

Later in the same hearing Mr. MacGuineas, a representative from the Department of Justice, said he did not understand what the bill was trying to do. "In order to understand that we would have to know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Congressman Dowdy responded, "Maybe we want it to apply to all suits. There is not any particular one. We want it to apply to any one." Congressman Whitener followed that up by saying, "I did not understand there was any doubt." *Id.* at 53-54. One type of suit hypothesized by Mr. MacGuineas was a slander suit against a congressman.[17] Congressman Whitener indicated that he felt the bill should cover such a situation, Hearings, *supra* at 55, and he compared it to a postal worker slapping a housewife as he delivered mail. *Id.* at 58.

The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority" phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official

[17] The Second Circuit has held that § 1391(e) does not apply to legislators, but the holding was based in part on not finding any "word in the five year gestation period of § 1391(e) to suggest that Congress thought it was changing the law not merely with respect to the executive branch but also concerning itself, its officers and its employees." *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970). This issue is not presented to us, and we do not decide it.

capacity or under color of legal authority.' That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." *Id.* at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs.

The Department of Justice expressed reservations about the utility of H.R. 10089 because it was limited to "official actions", and did not expand subject matter jurisdiction. Most actions against government officials, such as those seeking personal damages for acts in excess of official authority, would not be covered by a bill limited to "official capacity". Actions that would be "official", would be equivalent to mandamus actions, and so would still be confined to the District of Columbia for lack of subject matter jurisdiction elsewhere. *See Briggs* v. *Goodwin, supra,* 569 F.2d at 4. The new bill, H.R. 12622, 86th Cong., 2d Sess. (1960), met these objections. Section 1 of the bill added a new section, now codified as 28 U.S.C. § 1361, extending mandamus jurisdiction to all district courts.[18] In section 2 of the bill, § 1391(e), Congress included, inter alia, the phrase "under color of legal authority". *See Briggs* v. *Goodwin, supra,* 569 F.2d at 4-5.

This bill was reintroduced in the next Congress as H.R. 1960, 87th Cong., 1st Sess. (1961). The Department of Justice, in a letter from then Assistant Attorney General Byron White suggested more changes. The letter recognized that section 2 of the bill, the new § 1391(e) "covers an entirely different subject" than section 1, the new 28 U.S.C. § 1361, and that unless clarified § 1391(e) might

[18] 28 U.S.C. § 1361 reads:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

apply to "suits for money judgments against officers." S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Adm. News 2784, 2789 [hereinafter cited as Senate Report].[19] Though acting on other suggestions from that letter,[20] Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports state, "The venue problem also arises in an action against a Government official seeking damages *from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, *supra,* at 3; Senate Report, *supra,* 1962 U.S. Cong. & Admin. News at 2786 (emphasis added).[21]

In the face of all of this, appellants argue that § 1391(e) was meant to do no more than provide venue in cases to which § 1361 applies, actions in the nature of mandamus brought outside the District of Columbia. In support of this argument they point to language in the legislative history that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on

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[19] At minimum this letter demonstrates that Congress was on notice that personal damage actions against government officials were possible, contrary to appellants' argument that due to broad immunity under the doctrine of *Barr* v. *Mateo,* 360 U.S. 564 (1959), and because *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), was not yet decided, Congress would not have been thinking of such actions.

[20] For example, the letter suggested that the mandamus jurisdiction section should be limited to actions to compel a duty "owed the plaintiff". The Senate, by amendment adopted this provision, and the House accepted the amendment. *See* note 17, *supra. See generally Briggs* v. *Goodwin,* 569 F.2d 1, 5 n. 39 (D.C. Cir. 1977).

[21] This passage undermines appellants' argument that the only damage actions Congress contemplated were actions in the nature of mandamus against an official to recover money allegedly owed to the plaintiff by the United States.

jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report, *supra*, at 1. Appellants also point to the following paragraph of the Report:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority* and not as a private citizen. *Such actions are also in essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is *based upon the fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." *Id.* at 3-4 (emphasis as supplied by appellants).

We do not think that these passages clearly exclude the result that we have reached. Even if we were to acknowledge that the primary purpose of § 1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well. That it does do so and was intended to do so is indicated by the legislative history described above.

Further, unless one were prepared to argue that the 1976 amendment was a mistake, we think it must be taken as a further indication that Congress, whatever its intent at the time it passed § 1391(e), now understands the section to reach personal damage actions. The amendment, note 6, *supra,* allows defendants who are not government officers to be joined in an action with officers when venue as to the officers is asserted under § 1391(e). It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies.

We affirm the district court's holding that § 1391(e) applies to personal damage actions.

Personal Jurisdiction

Appellants' final argument is that § 1391(e)'s service of process provision facilitates the broadened venue provisions, but only if the district in which the suit is brought can establish personal jurisdiction by some other mechanism. In the alternative they argue that even if § 1391(e) broadens personal jurisdiction, it would be unconstitutional to apply it to individuals who lacked the minimum contacts with the state in which the court sits that are required by *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny.

Appellants state their argument as follows:

> "Nothing in Section 1391 speaks to personal jurisdiction. The statute is entitled 'venue generally' and sets forth in its various sections the rules of venue in civil actions. The statute specifically authorizes only a method of service of process, as distinct from a grant of *in personam* jurisdiction, for the federal officers or agencies within its purview. Indeed, the service of process provision in the statute emphasizes the focus

> of the statute on review of agency actions and present officials since service is to be made 'to the officer or agency.' The statute addresses only the mechanics of service of process and does not address the exercise of personal jurisdiction. Obviously, it is one thing for an individual to be served the process extraterritorily [*sic*], but quite another for that individual to be subject to the personal jurisdiction of a court in compliance with the Constitutional requirements of due process."[22]

It is true that jurisdiction over the person and service of process are distinguishable, but they are closely related.[23] "[S]ervice of process is the vehicle by which the court may obtain jurisdiction." *Aro Manufacturing Co.* v. *Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965). If Congress, by § 1391(e), authorized service of process beyond the geographical limits that F. R. Civ. P. 4(f) would otherwise impose, and if such service does not violate the Constitution, then service was properly made in this case, and the court properly acquired jurisdiction over the persons of the appellants.

Because appellants are being sued in their individual capacities, they must be served as required by F. R. Civ. P.

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[22] The facts that § 1391(e) was part of "The Mandamus and Venue Act" and that it is codified in a chapter labelled "District Courts; Venue" are factors to consider in determining whether the statute can be used as a basis of personal jurisdiction. They do not overcome, however, the plain language of the statute, which read in the light of the legislative history, *see United States* v. *Culbert*, *supra*, note 7, as set out in the text, indicates that the statute confers personal jurisdiction as well as venue. Moreover, there is not an obviously more appropriate chapter of the code. The chapter entitled "District Courts; Jurisdiction" deals exclusively with subject matter jurisdiction.

[23] The distinction is most important, as an issue of federal practice, in diversity cases. A state long arm statute might authorize extraterritorial service of process that would reach a defendant over whom the state could not constitutionally exercise personal jurisdiction.

4(d)(1), rather than 4(d)(4) or 4(d)(5). That is, a copy of the summons and complaint must be personally delivered. Rule 4(f), however, limits service of process to the territory of the state in which the court is sitting. But Rule 4(f) permits statutory exceptions, and Congress has, in some cases, authorized service of process beyond state boundaries. *See Robertson* v. *Railroad Labor Board,* 268 U.S. 619, 622 (1925); 4 Wright & Miller, Federal Practice and Procedure, § 1125 (1969); Hart & Wechsler, *supra,* at 1106-07. The first question is whether Congress did so in this case.

The second paragraph of § 1391(e) provides that "[t]he summons and complaint . . . shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." Clearly this provision does more than describe the mechanics of service of process. It creates an exception to the general rule by allowing service of process anywhere in the United States by certified mail.

Not only does our reading of the statute command such an interpretation, but we are persuaded that this is precisely what Congress intended. Judge Maris, testifying before the subcommittee as a representative of the Judicial Conference, pointed out that the original bill, H.R. 10089, created a "problem about the acquisition of jurisdiction in personam by the Court in the venue" created by the bill. Hearings, *supra,* at 87. The bill relied on the Federal Rules of Civil Procedure to provide service of process, but Rule 4 would not permit service of process on the individual involved in the suit if that individual were outside the state in which the suit was brought. Judge Maris suggested that the statute provide for broader service:

"There are statutes which do, like the Antitrust Laws, the Sherman Antitrust Act, under which you can bring a suit against defendants and serve them anywhere in the United States, and of course under the Bankruptcy Act you can serve persons anywhere in the United States.

"Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.

"That would take care of it because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so." Hearings at 88-89.

Congress, following Judge Maris' suggestion, provided nationwide service of process by mail and expected that broadening service would correspondingly broaden personal jurisdiction. Congress recognized that it would serve no purpose to broaden venue without also broadening service of process. House Report, *supra*, at 4. *See Briggs* v. *Goodwin, supra*, 569 F.2d at 7-8. Thus, to the same extent that § 1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction.[24]

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[24] *See Briggs* v. *Goodwin, supra*, 569 F.2d at 8; *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1382 (2d Cir. 1970) (dictum); *United States* v. *McAninch*, 435 F. Supp. 240, 244 (E.D. N.Y. 1977); *Driver* v. *Helms*, 74 F.R.D. 382, 389 (D. R.I. 1977); *Lowenstein* v. *Rooney*, 401 F. Supp. 952 (E.D. N.Y. 1975); *Crowley* v. *United States*, 388 F. Supp. 981, 987 (E.D. Wis. 1975); *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973); *English* v. *Town of Huntington*, 335 F. Supp. 1369, 1373 (E.D. N.Y. 1970); *Macias* v. *Finch*, 324 F. Supp. 1252, 1255 (N.D. Cal. 1970); *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western R.R. Co.*, 290 F. Supp. 612 (D. Colo. 1968), *aff'd*, 411 F.2d 1115 (10th Cir. 1969). *Cf. Ashe* v. *McNamara*, 355 F.2d 277, 279 (1st Cir. 1965).

Having concluded that Congress did create nationwide service of process, we must next decide whether § 1391(e), so interpreted, is constitutional. Appellants argue, and we will assume, that they lack "minimum contacts" with the State of Rhode Island. The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries. The circumscription of state court jurisdiction is a product of boundaries to states' sovereignty.[25] The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind. Whether or not Congress could go so far as to establish only one national district court, *see Briggs* v. *Goodwin, supra,* 569 F.2d at 9, it is clear that Congress could greatly reduce the number of federal districts and draw their boundaries without regard to state boundaries. *See id.*, at 8-10.

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[25] This remains true even after *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). A state boundary is still a significant jurisdictional demarcation because if a defendant is found and served within the state, minimum contacts need not be established, and jurisdiction may be asserted on the basis of the state's sovereignty. We see no reason why the United States does not have the same power over defendants found within its borders. Even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States. *See United States* v. *McAninch,* 435 F. Supp. 240, 244 (E.D. N.Y. 1977).

Appellants argue that the two Supreme Court cases cited above demonstrate that the Court has banished sovereignty as a factor in determining jurisdiction, substituting a test based on "[f]air play and substantial justice [which] are in the main functions of distance." We can think of no case that has made distance a factor in determining minimum contacts. The test to determine whether a defendant may be brought before a state's courts, say the courts of Rhode Island, is no different whether that defendant is found in Connecticut or in Hawaii.

Appellants next argue, with some force, that it would be very unfair and would violate due process to force them, as individuals, to answer suits in districts with which they have no connection and, further, that answering such suits places a burden upon them greater than that carried by a private litigant who would not have to travel to a far-away court—a court which might be far removed from the place where the cause of action arose, and which might have been chosen because the plaintiffs felt the judge would be friendly to their claims. We acknowledge that these appellants may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power "[f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C. § 1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights. Furthermore, we note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

Congress is, of course, limited in the actions it can take by the Due Process Clause of the Fifth Amendment, but application of the Clause is not related to state boundaries. Rather, the requirement is that the nationwide "service required by statute must be reasonably calculated to inform the defendant of the pendency of the proceedings in order that he may take advantage of the opportunity to be heard in his defense." *Mariash* v. *Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). Certainly the certified mail requirement in § 1391(e) meets that standard. Such service is not extra-

territorial for a court of the United States; therefore, the minimum contacts analysis is not relevant. We conclude that national service of process as provided by § 1391(e) is constitutional.[26] *Briggs* v. *Goodwin, supra,* 569 F.2d at 8-10; *United States* v. *McAninch, supra,* 435 F. Supp. at 244; *Driver* v. *Helms, supra,* 74 F.R.D. at 391.

Affirmed in part, reversed in part, and remanded.

[26] The Supreme Court has apparently not decided this precise issue since *International Shoe.* In one case the Court decided not to address the issue. *United States* v. *Scophony Corp.,* 333 U.S. 795, 840 n. 13 (1948).

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

RODNEY DRIVER *et al.*

v.

RICHARD HELMS *et al.*

Civ. A. No. 75-224.

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND.

April 1, 1977.

OPINION

PETTINE, Chief Judge

Plaintiffs are five American citizens who have brought this action on behalf of themselves and all those similarly situated against thirty present and former officials. The amended complaint alleges that the defendants "engaged in an extended conspiracy to conduct an illegal and unconstitutional program surreptitiously to intercept, open, read and photograph tens of thousands of sealed first-class letters deposited in the United States mails by plaintiffs and members of their class", thereby violating plaintiffs' rights under the First, Fourth, Fifth, and Ninth Amendments.[1] Plaintiffs seek declaratory and injunctive relief to operate against Defendant Clarence Kelley, Director of the Federal Bureau of Investigation; damages against each of the other

1. Events giving rise to this lawsuit are described in the Report to the President by the Commission on CIA activities (June 6, 1975) (hereinafter referred to as the "Rockefeller Report"). *See also* Senate Select Committee to Study Governmental Operations with respect to intelligence Activities, Final Report, Book III, 559-679, S.Rep.No.94-755, 94th Cong., 2nd Session (1976) (hereinafter referred to as the Final Report of the Select Committee).

defendants, sued in his individual and official, or former official, capacities; and certain other relief.[2]

Subject matter jurisdiction is invoked under 28 U.S.C. §§ 1331(a), 1339, 1343, 1361, and 5 U.S.C. § 702.

After extensive consultation with the parties, the Court issued an Order setting up a procedure for disposition of the expected deluge of preliminary motions. This Opinion, pursuant to that Order, disposes only of the individual defendants' motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) (lack of jurisdiction over the person), 12(b)(3) (improper venue), and 12(b)(4) (insufficiency of process); of plaintiffs' motion to certify the class; and of the motions to dismiss Clarence Kelley.

Each defendant against whom damages are sought[3] has moved to dismiss for lack of personal jurisdiction and improper venue. Plaintiffs argue that this Court has jurisdiction over the persons of all defendants under 28 U.S.C. § 1391(e) and Rhode Island's long-arm statute, Section 9-5-33, Rhode Island General Laws (1956), as amended, and that venue is proper under 28 U.S.C. § 1391(b) and (e).

Personal Jurisdiction and 28 U.S.C. § 1391(e)

Rule 4(f) of the Federal Rules of Civil Procedures provides for service of a district court's process anywhere within the territorial limits of the state in which the district court is held and, when authorized by a statute of the

2. The United States' motion to intervene as a party-defendant was granted on September 26, 1975. *See Driver* v. *Helms*, 402 F.Supp. 683 (1975) for earlier proceedings in this case. Damages are now sought against the United States directly under 28 U.S.C. § 1331(a). The Court will defer ruling on the pending Motion to Dismiss of the United States and will consider it together with the Motion to Dismiss of defendant U.S. in *Driver* v. *United States*, No. 76-297.

3. Except the United States. *See* note 2, *supra*.

United States, beyond the territorial limits of that state. Each of the defendants was served far outside the territorial limits of Rhode Island; to justify this process, plaintiffs contend that 28 U.S.C. § 1391(e) (1976) is a statute authorizing such national service of process in damage actions against present and former government officials acting under color of legal authority.

As plaintiffs point out, prior to the passage of § 1391(e) in 1962, citizens were unable to obtain effective relief for claims against federal officials arising from violations of federal law. Rule 4(f), F.R. Civ. P., prevented the federal courts from exercising personal jurisdiction over non-resident federal officials. And even if jurisdiction could be acquired pursuant to state law (long-arm statutes were just coming into general use at the time), venue in a federal question action would only lie in the district where all the defendants resided. *Compare* 28 U.S.C. § 1391(b) (1962 ed.) (venue where all defendants reside) with 28 U.S.C. § 1391(b) (Supp. 1975) (adding venue "in the judicial district . . . in which the claim arose"). Thus, in cases where plaintiff's claim arose from the joint acts of federal officials who resided in different districts, citizens were forced to file separate suits against the defendants in the districts where they resided. In cases where a superior federal officer residing in Washington, D.C. was an "indispensable" party to an action, citizens were only able to litigate the claim in the District of Columbia, and were unable therefore to join a subordinate officer residing elsewhere who was equally necessary to the action. *See generally* 4 Wright and Miller, Federal Practice and Procedure: Civil § 1107, at 417, (1969 ed. Supp. 1976); 2 J. Moore, Federal Practice § 4.29, at 1209 (2d ed. 1975).

As a result of these obstacles, litigation against federal officials for redress of statutory and constitutional rights

was "too expensive and inconvenient for many plaintiffs". Hart and Wechsler, The Federal Courts and the Federal System 1386 (1973).

To eliminate at least some of these obstacles and to enable citizens to obtain relief against official wrongdoing effectively, conveniently, efficiently, economically, and fairly, § 1391(e) was enacted in 1962. As the Senate Report stated, the purpose of the statute was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government". S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962). Section 1391(e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action was brought. [4]

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4. Sec. 1391(e) was enacted as part of the Mandamus and Venue Act of 1962. The legislative history is contained in H.R.Rep.No. 536, 87th Cong., 1st Sess. (1961) [hereinafter H.Rep.]; S.Rep.No.1992, 87th Cong., 2d Sess. (1962), reprinted in 1962 *U. S. Code Cong. and Adm. News*, pp. 2785-2786 [hereinafter S. Rep.]

The Act of October 21, 1976, Pub.L. 94-574, § 3, amended § 1391 (e), adding after the last sentence of the first paragraph the following:

The defendants argue that § 1391(e)(1) does not supply personal jurisdiction (2) does not apply in actions for damages, (3) does not apply to officials sued in their "individual" capacity, and (4) does not apply to former federal officials. The Court turns to each of these arguments.

1. § 1391(e) supplies personal jurisdiction

[1] This Court is of the firm opinion that § 1391(e) is indeed a statute authorizing nationwide jurisdiction which would be otherwise unavailable to a federal court bound by Rule 4(d). This opinion is shared by the great majority of courts, and all of the commentators, which have considered the question. And the legislative history of § 1391(e), while not a model of clarity, amply supports the Court's conclusion.

The House Committee Report accompanying § 1391(e) states:

> In order to give effect to the broadened venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in

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Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

This amendment was intended only to overrule the holdings of some courts that § 1391 was inapplicable when there were any non-federal defendants. *See* 105 Cong.Rec. S11352 (daily ed. July 1, 1976), *citing Natural Resources Defense Council* v. *TVA*, 459 F.2d 255, 257 n. 3 (2d Cir. 1972). Having examined the legislative history of this amendment to § 1391(e), the Court does not believe that it in any way affects the conclusions here reached.

> which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought.

H. Rep No. 536, 87th Cong., 2d Sess., at 4 (1962). Professor Moore agrees that subsection (e) both expands venue and extends the area in which the district court's process will run:

> [Sec. 1391(e)] realistically broadens venue in any civil action (not just mandamus proceedings) where each defendant is a federal officer, employee or agency and is sued for acts done in his official capacity or under color of legal authority; and provides for extraterritorial service of process, if necessary, in such an action. 2 J. Moore, Federal Practice, § 4.29, 1210 (2d ed. 1975).

Accord, 4 Wright and Miller, Federal Practice and Procedure, Civil § 1107 (1969 ed., Supp.1975).

The Second Circuit has stated that where § 1391(e) is applicable, it supplies both venue and *in personam* jurisdiction. *Liberation News Service* v. *Eastland,* 426 F.2d 1379 (2d Cir. 1970) (dicta). *Accord, Lowenstein* v. *Rooney,* 401 F.Supp. 952, 961-962 (S.D.N.Y. 1975); *Crowley* v. *United States,* 388 F.Supp. 981, 987 (E.D. Wis. 1975); *Environmental Defense Fund, Inc.* v. *Froehlke,* 348 F.Supp. 338, 364 (W.D.Mo.1972), *aff'd on other grounds,* 477 F.2d 1033 (8th Cir. 1973); *English* v. *Town of Huntington,* 335 F.Supp. 1369, 1373 (E.D.N.Y. 1970); *Macias* v. *Finch,* 324 F.Supp. 1252, 1254-1255 (N.D. Cal.

1970); *Brotherhood of Locomotive Engineers* v. *Denver and R.G.W.R. Co.*, 290 F.Supp. 612, 615-616 (D.Colo. 1968), *aff'd* 411 F.2d 1115 (10th Cir. 1969); *Powelton Civic Home Owners Ass'n* v. *Department of Housing and Urban Renewal*, 284 F.Supp. 809, 834 (E.D.Pa.1968). *See also Relf* v. *Gasch*, 167 U.S.App.D.C. 238,511 F.2d 804, 808 (Robb, J., concurring).

Defendants argue that § 1391(e) speaks only to service of process, not to the exercise of personal jurisdiction, which they contend must be otherwise acquired. Typical of this line of argument is the following passage from the brief of Defendants Colby, Schlesinger, Cushman, and Walters, which the Court finds necessary to quote from at length:

> The distinction between the mechanics of service of process and whether service is effective to confer personal jurisdiction is elementary and clear. Plaintiffs appear to treat the two together without an appreciation of the fact that two very different concepts are involved.
>
> "Although Rule 4 [of the Federal Rules of Civil Procedure] is concerned with defining the various acceptable methods for effecting service of process, its operation cannot be understood without an appreciation of the history and current status of the law relating to the personal jurisdiction of the courts. This is true because underlying the question of service of process is the preliminary inquiry into whether the court has the power to summon a defendant before it to adjudicate a claim against him. • • • Rule 4 does not speak to this subject, which at present is governed primarily by the Supreme Court's interpretation of the Due Process Clause of the Constitution and the network of state and federal statutory provisions." 4 Wright and Miller, *Federal Practice and Procedure* (1969) at pp. 205-206.

Stated simply, the second paragraph of Section 1391(e) provides that in cases which fall within its scope, that is when jurisdiction is already present and venue is conferred by the first paragraph of Section 1391(e), the mechanics of service of process shall be "as provided by the Federal Rules of Civil Procedure" except those mechanics are modified to the extent that "delivery of the summons and complaint [under Rule 4(d)(5)] may be made by certified mail beyond the territorial limits of the district in which the action is brought". Such a modification of the method of service of process under the Federal Rules does not answer, as plaintiffs would have this Court believe, the "preliminary inquiry into whether the Court has the power to summon a defendant before it to adjudicate a claim against him". 4. Wright and Miller, *supra*, at p. 205.

> Not at all dissimilar this scheme is the operation of state service of process provisions such as the Rhode Island rules. Service of process is permitted by mail beyond the territorial limits of the Rhode Island courts, R.I.C.P., Rule 4(e), but this alone does not confer jurisdiction since before a defendant is amenable to such service and thereby subject to the jurisdiction of Rhode Island, he must have the "necessary contacts" with Rhode Island.

[2] By applying to § 1391(e), analysis germaine to jurisdiction under Rule 4, F.R. Civ.P. the defendants completely misperceive the nature of the problem at hand, and rely on an inapposite line of cases, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 228, 2 L.Ed.2d 1283 (1958); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Company* v. *State of Washington*. 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1954). For

those cases in which Congress has decided that the jurisdiction of federal courts shall be coextensive with the jurisdiction of the states in which they sit (that is, all cases directly ruled by Rule 4(d)), minimum contacts analysis is indeed in order. State courts may exercise jurisdiction only over defendants within their territory or over defendants who are deemed present within the territory by virtue of purposeful activity which constitutes such minimum contacts. *International Shoe, supra.*

[3] However, Congress may provide for national service of process, i.e., national exercise of personal jurisdiction by each of the district courts based on presence of the defandant in the United States, rather than in any particular state. *Robertson* v. *Railroad Labor Board,* 268 U.S. 619, 45 S.Ct. 621, 69 L.Ed. 1119 (1925). *See Hart and Wechsler, supra,* at 1106. When Congress does so provide,[5] the district court's service is not constrained by the due process (*International Shoe, Hanson* v. *Denckla*) limits to which state courts are subject. *See Mariash* v. *Morrill,* 496 F.2d 1138, 1142-43 (2d Cir. 1974). Instead, the due process limitation on national service of process is found by inquiring into the fairness of such jurisdiction in the particular circumstances and facts of the case at hand, an inquiry mandated by the Fifth Amendment Due Process Clause. *Mariash* v. *Morrill, supra,* at 1142-43; *see also Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191, 198-205 (E.D.Pa. 1974). *Cf. International Shoe, supra,* 326 U.S. at 320, 66 S.Ct. 154.

[4, 5] The Court believes that the exercise of national personal jurisdiction pursuant to § 1391(e) here is consistent with the applicable due process test. In *Mariash* v.

5. For a partial list of other statutes which authorized federal courts to exercise national *in personam* jurisdiction, see 2 J. Moore, Federal Practice par. 433 at 1242 (2d ed. 1975); id. par. 4.42(i), at 1293.8-1293.10.

Morrill, supra, the Second Circuit held that Congressionally authorized national jurisdiction satisfied due process if it was based on service calculated to inform the defendant of the proceedings in order that he may take advantage of the opportunity to be heard. As Chief Judge Kaufman noted, speaking for a panel including Associate Justice Clark, nationwide service of process, when authorized by Congress, is not extra-territorial at all. Therefore, the due process limitation on such process should be precisely the limitations applicable on a state's process within its territorial limits: notice calculated to inform the defendant of the pendency of the suit. *Mullane* v. *Central Hanover Bank and Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).[6] Since it is undisputed that each of the defendants has been served according to the statute, and that such notice informed each defendant of the pendency of this suit so as to enable them

6. Extra-territorial service of process must be based on necessary minimum contacts to satisfy due process. *International Shoe Company* v. *State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In *Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D.Pa.1974), the court went further, holding that the due process limits on *national* service of process should be governed by a five-part fairness test, incorporating a minimum contacts test. But *Oxford First* relied primarily on *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972), which had required a showing of minimum contacts only because it was a true case of *extra-territorial service* of nationwide process—service under the Securities Act of 1934 on a foreign citizen living abroad. *See* the Second Circuit's explanation of *Leasco* in *Mariash* v. *Morrill,* 496 F.2d 1138, 1143 n. 9. For that reason, it was necessary to determine whether those citizens had the necessary "minimum contacts" with the United States. Thus the *Oxford First* court seems to have proceeded on an incorrect premise; as Chief Judge Kaufman has made clear. Congressionally authorized nationwide service (as opposed to extra-territorial service) must meet only the requirements of *Mullane* v. *Central Hanover Bank and Trust,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), not those of *International Shoe, supra. See Mariash* v. *Morrill,* 496 F.2d 1138, 1143 n. 9.

to take advantage of the opportunity to be heard, the Court finds that the service effected comports with Due Process.

Defendants attempt to buttress their argument that § 1391(e) authorizes service only where *in personam* jurisdiction is otherwise acquired through minimum contacts by relying primarily on *Schlanger* v. *Seamans*, 401 U.S. 487, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971), *Strait* v. *Laird*, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972), *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971) and *Carney* v. *Laird*, 326 F.Supp. 741 (D.R.I. 1971), *aff'd*, 462 F.2d 606 (1st Cir. 1972). The Court finds these cases inapposite.

In *Schlanger* v. *Seamans, supra*, the Supreme Court held that an Arizona federal court was without jurisdiction to entertain a habeas corpus petition of an enlisted man in the Air Force who, although temporarily in Arizona, was under the custody of officials at Moody Air Force Base in Georgia.

The Court's rationale was simply that § 1391(e) did not apply to habeas corpus actions. The Court qualified its holding that jurisdiction over respondents in habeas corpus actions was territorial by observing:

> Although by 28 U.S.C. § 1391(e) (1964 Ed., Supp. V), Congress has provided for nationwide service of process in a "civil action in which each defendant is an officer or employee of the United States," the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. . . . Though habeas corpus is technically "civil", it is not automatically subject to all the rules governing ordinary civil actions. (citations omitted) 401 U.S. at 490 n. 4, 91 S.Ct. at 997.

Section 1391(e) applies to actions against government officers "except as otherwise provided by law". The Court found in *Schlanger* that the habeas corpus statute, 28 U.S.C. § 2241, did indeed provide otherwise. Therefore,

§ 1391(e) did not apply, and a district court's reach of *in personam* jurisdiction in habeas corpus actions was limited to the traditional territorial jurisdiction of the district courts.

The other habeas corpus decisions cited by the defendants follow from the rule established in *Schlanger, supra,* and establish only the proposition that § 1391(e) is unavailable to establish personal jurisdiction in habeas corpus actions. *See* 4 Wright and Miller, Federal Practice and Procedure, § 1107, at 89 (Supp. 1975). In *Strait* v. *Laird, supra,* the Court held that the territorial jurisdiction of the district court for habeas corpus actions could be justified by using the respondent's minimum contacts in the district to impute his presence there. The Court did not find it appropriate to cite or discuss § 1391(e) at all, basing its decision on its interpretation of 28 U.S.C. § 2241. In *Carney* v. *Laird, supra,* this Court relied on *Schlanger,* holding that § 1391(e) did not extend the habeas corpus jurisdiction of the district courts. That opinion did not consider, much less decide, whether § 1391(e) authorized the exercise of *in personam* jurisdiction beyond the limits provided by Rhode Island's long-arm statute in civil actions other than habeas corpus. *Carney* v. *Laird, supra,* at 744.

Smith v. *Campbell, supra,* cited by many of the defendants, appears to support their contention that § 1391(e) is unavailable to ground personal jurisdiction in civil actions.[7] However, *Smith* too was a habeas corpus action, relying on the rule of *Schlanger* v. *Semans.* The dicta so heavily relied on by defendants appears to have exactly the same meaning as this Court's observations in *Carney* v. *Laird, supra.* To the extent that the Ninth Circuit meant

7. "Section 1391 may not be utilized to confer jurisdiction, but can be in order to effectuate jurisdiction once it has attached." 450 F.2d at 834.

to generalize its position to civil actions other than habeas corpus, this Court is in disagreement, and respectfully declines to follow.

2. *Section 1391(e) applies to damage actions*

Defendants make two related claims which bear on the question whether the liberalized terms for securing personal jurisdiction under § 1391(e) can be invoked in actions for damages against current federal officials. First, they argue that § 1391(e) pertains only to actions in the nature of mandamus against government employees under 28 U.S.C. § 1361. Second, they contend that § 1391(e) does not apply to defendants sued in their "individual" capacities. The Court will consider each of these arguments in turn.

a. *Section 1391(e) applies to damages actions as well as mandamus actions.*

[6] Section 1391(e), by its terms applies to any civil action in which "a defendant is an officer or employee of the United States . . . acting in his official capacity or under color of legal authority". On its face, then, § 1391(e) covers far more than mandamus actions. However, the Supreme Court has held that habeas corpus actions do not fall within § 1391(e), *Schlanger* v. *Seamans, supra,* 401 U.S. at 490 n. 4, 91 S.Ct. 995 and this Court must decide whether the subsection is inapplicable to damage actions as well.

Defendants rely on the legislative history of § 1391(e) for their argument that Congress meant to restrict its application to mandamus actions. There is no doubt that the legislative history can be read to support such a position. However, the Court believes that properly read the legislative history makes it clear that § 1391(e) refers to damage actions as well as mandamus actions.

At the outset, the Court wishes to emphasize what should be apparent. If Congress wanted to limit the application of § 1391(e) to mandamus actions, the statutory language it chose was extraordinary ill-fitted to that task. The subsection applies to "a civil action in which [each] defendant is an officer . . .", not to "any action in the nature of mandamus . . ." which was the language Congress used in 28 U.S.C. § 1361, a statute passed together with § 1391(e). Congress has demonstrated its ample ability to distinguish between civil actions in general and mandamus actions in particular, and this Court believes that the legislative history contradicting the plain meaning of the subsection would have to be unusually clear and persuasive to warrant adoption of a reading which a) is opposed to the plain meaning of the words of the subsection, and b) attributes such carelessness to Congress. The Court therefore turns to the legislative history, and to an attempt to discern "the mischief" at which § 1391(e) was directed.

The Mandamus and Venue Act of 1962 contained two "entirely different subjects",[8] accordingly to then-Deputy

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8. There is clearly a contradiction between the recognition by the Department of Justice that §§ 1361 and 1391(e) covered "entirely different subject[s]" and Judge Friendly's admonition that §§ 1361 and 1391(e) must be read together. *See Natural Resources Defense Council v. TVA*, 459 F.2d 255, 258 (2d Cir. 1972). Defendants rely on Judge Friendly's dictum to argue that § 1391(e) only authorizes service and jurisdiction in actions made possible by § 1361—that is, mandamus actions. As the House Report states,

> this bill is not intended to give access to the federal court to an action which cannot now be brought against a federal official in the United States District Court for the District of Columbia.

H.Rep.No.536, 87th Cong., 2d Sess., at 2. However, for reasons stated below in the text, this Court finds the language of the House Report refers only to the subject matter jurisdiction conferred in Section 1 of the bill, which became § 1361. *See also* Cramton, Nonstatutory Review of Federal Administrative Action, 68 Mich.L.Rev. 387, 453 (1970), and *infra* n. 10.

Attorney General Byron R. White, whose letter so stating to Senator Eastland, Chairman of the Senate Judiciary Committee, appears in the official legislative history. *See* U.S. Code Cong. and Adm.News, 87th Cong., 2nd Sess., at 2789 (1962). First in what is now 28 U.S.C. § 1361, Congress facilitated review of administrative actions by abrogating the ancient rule by which only the district court for the District of Columbia had jurisdiction to mandamus federal officers. *See Liberation News Service* v. *Eastland, supra* at 1383. As Judge Friendly has noted "this jurisdictional change . . . became the main subject of Congressional and executive concern". *Id.* Second, in what became 28 U.S.C. § 1391(e), Congress authorized broadened venue and national service of process in civil actions against employees of the United States "acting in . . . official capacity or under color of legal authority". S.Rep. No. 1992, 1962 U.S. Code Cong. and Adm.News, *supra*, at 2786.

The presence of these two separate subjects accounts for the difficulties caused by the legislative history, which makes sense only on the understanding that § 1391(e), but not § 1361, extends beyond mandamus actions. Both the House and Senate Reports contain the following paragraph, in identical words:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty.
>
> H.Rep. at 3; S.Rep. at 3.

Hart and Wechsler, supra, at 1388, say that "A literal reading of the statutory language would make the section applicable to all types of 'civil actions' against federal

officers, and that is precisely how most courts have construed § 1391(e)". Professor Moore agrees:

> . . . [Sec. 1391(e)] realistically broadens venue in any civil action (not just mandamus proceedings) where each defendant is a federal officer, employee, or agency and is sued for acts done in his official capacity or under color of legal authority; and provides for extraterritorial service of process, if necessary, in such an action.

2 Moore, Federal Practice, paragraph 4.29, 1210 (2d ed. 1971)

As plaintiffs demonstrate, numerous courts have applied the statute to a variety of settings where the complaint sought monetary relief for the violation of constitutional rights. In *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972), the Fifth Circuit held that § 1391(e) applies to a damage action by a federal prisoner against prison officials for unconstitutional treatment. *See also Patmore* v. *Carlson*, 392 F.Supp. 737, 739-740 (E.D.Ill.1975). In *Lowenstein* v. *Rooney*, 401 F.Supp. 952 (S.D.N.Y.1975), the court applied § 1391(e) to a damage claim against present and former officials for violating plaintiff's constitutional rights. In *Briggs* v. *Goodwin*, 384 F.Supp. 1228, 1230 (D.D.C.1974), the court applied § 1391(e) to a damage action arising out of the unlawful conduct of federal prosecutors in a criminal case. *Wu* v. *Keeney*, 384 F.Supp. 1161 (D.D.C.1974) and *Green* v. *Laird*, 357 F.Supp. 227 (N.D.Ill.1973) also recognized the applicability of § 1391(e) to damage actions.[9]

9. While some of the above-cited cases fail directly to address the issue, in each of them a close reading makes it clear that the court of necessity relied on § 1391(e) to ground at least venue, and usually jurisdiction as well, in a damage action. This Court rejects the suggestion of some defendants that this authority is worthless by virtue of those courts' failure to focus in on the problem, at least

See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 Georgetown L.J. 19, 36-37 (§ 1391(e) applicable to damage suits against officers acting under color of legal authority); Cramton, Nonstatutory Review of Federal Administrative Action, 68 Mich.L. Rev. 387; 455 (1970) (same).[10]

Against this strong authority, defendants make a series of arguments based primarily on the fact that § 1391(e) was passed jointly with the Mandamus Act, 28 U.S.C. § 1361. They rely on the following language in the legislative history:

> The purpose of this bill, as amended, is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia.
>
> This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia. S.Rep.1992, *supra*, at 2; 1962 U.S. Code Cong. and Adm.News, *supra*, at 2784-85.

Since the present action was not cognizable only in the District of Columbia prior to the passage of the Mandamus and Venue Act of 1962, the argument goes, the statute cannot encompass this claim.

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where so many courts made the same "mistake" and where each of the defendants was presumably represented by counsel from the Department of Justice, who would have been alerted to § 1391(e)'s potential for reaching damage actions from the outset. *See* fn. 22, *infra*.

10. The Court notes that Dean Cramton has been publicly recognized by the Senate as the craftsman of the revisions of § 1391(e). *See* 105 Cong.Rec. S11532 (daily ed. July 1, 1976). His views are therefore of considerable weight and importance.

There are a number of crucial errors in this line of reasoning.

First, the defendants argue that this action could have been brought in any district "where the claim arose", and for that further reason is not an action which could only have been brought in the District of Columbia before passage of Section 1391(e). However, as plaintiffs observe, that venue provision did not exist until 1966, when 28 U.S.C. § 1391(b) was amended. Moreover § 1391(e)(1) provides venue in the district where *one* of the defendants resides. If the defendants may reside in more than one district, then all the defendants need not reside in the District of Columbia. Thus, subsection (e)(1) contemplates actions against individuals who do not reside in the District of Columbia and therefore could not have been sued there prior to the enactment of § 1391(e).

A close reading of the legislative history convinces the Court that the language cited by defendants was addressed not to the entire bill but solely to the mandamus section. In his letter to Senator Eastland, then-Deputy Attorney General White expressed the concern of the Justice Department that the act might be construed to extend the mandamus power to instances where there was no clear legal duty.

> Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. S. Rep., *supra*, at 6; 1962 U.S. Code Cong. and Adm. News, *supra*, at 2788.

In response to this concern, the Senate Committee added clarifying language to § 1361, and inserted in its Report the above-cited language, limiting the new mandamus sub-

ject-matter jurisdiction of the district courts to the power which had previously existed in the District of Columbia. This limitation was not addressed to that part of the bill which became 28 U.S.C. § 1391(e).

It is noteworthy that the Deputy Attorney General's letter had gone on to suggest tying section 2 of the bill, (now § 1391(e)), to the Administrative Procedure Act, to

> ". . . unquestionably eliminate[s] suits for money judgments against officers . . ." S. Rep 1992, *supra*, at 6; U.S. Code Cong. and Adm. News, *supra*, at 2789.

Although Congress adopted White's other suggestions it refused to act on this one. While such Congressional inaction is of course not dispositive, the fact that Congress was made aware of the construction which § 1391(e) invited is telling. The Court finds this additional support for its conclusion that the statements in each Report, that the venue and jurisdictional problem of suing federal officers for damages would be solved by § 1391(e), indeed say what they seem to say.

In summary, the legislative history clearly states that the venue provisions were intended to overturn the decisions by which citizens seeking relief against government officials were forced to sue in Washington, D.C. by virtue of the the then-operative federal question venue statute (venue was available only where all defendants resided) [11] and the indispensable party rule (even where the defendant official was in plaintiff's local district, a superior officer in

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11. Since venue in federal question cases at the time § 1391(e) was passed was available only where defendants resided, *see supra* at 2, the great majority of the defendants here could have been sued only in Washington, D.C. under that former venue statute. Therefore, if Congress intended § 1391(e) to apply only to actions which, at the time of its passage, could be brought in Washington, D.C., many of the pending motions to dismiss would still have to be denied.

Washington found indispensable would defeat the action, since venue would be improper in the home district.) *See* S.Rep., *supra* at 2-3, U.S.Code Cong. and Adm. News, *supra*, at 2786. *See also* 4 Wright and Miller § 1107, *supra* at 419-420. The same history specifically includes damage actions in the catalogue of "mischiefs" to be remedied. It is therefore not surprising that defendants have not cited a single case which holds that § 1391(e) is inapplicable to damage actions.[12]

The Court can only conclude, therefore, that § 1391(e) does indeed apply to damage actions. Whether it applies to actions seeking damages against officials as individuals, and where those officials are *former* employees, remain to be considered.

b. *Section 1391(e) applies to defendants sued in their "individual" capacities for actions accomplished under color of legal authority.*

[7] All the defendants to whom the plaintiffs look to recover money damages for the violation of their constitutional rights, are sued in their "individual" capacity, and also in their "official" or "former official" capacity, as the case may be (depending on whether they are or are not now in government employ). But it is the "individual" capacity which allows recovery of money damages. That designation satisfies the fiction which was first adopted in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in order to overcome the impediment of sovereign immunity. Its purpose is to characterize the illegal or unconstitutional acts of government officials done under color of legal authority (i.e., in the course of employment), as their own for

12. Defendants do cite authority that § 1391(e) is inapplicable to damage actions brought against defendants individually. *See* part 2(b), *infra*.

which they may incur liability. As it was specifically put in *Ex Parte Young:*

> If the act which the [official] seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such an enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. 209 U.S. at 159-60, 28 S.Ct. at 454 (emphasis added).[13]

Acknowledgement of the fiction, and its function, is explicitly contained in § 1391(e) which uses the language "under color of legal authority".[14]

The House Committee Report explained the significance of the phrase (H.R.Rep. pp. 3-4):

> By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the

13. Though *Ex Parte Young* was an action to enjoin a state official, the fiction has been transported to apply to federal officials, *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), and to actions for money damages. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (state officials); *Bivens* v. *Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (federal officials).

14. The phrase was inserted over the objection of the Justice Department, which argued for the statute's limitation to acts done in an official capacity. Jacoby, *Nonstatutory Judicial Review*, 53 Geo.L.J. 19, 32-33 (1964).

> United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity. Considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned. *Id.* at 3—4.

Defendants agree that damages can be awarded against them only in their individual capacities. However, they contend that § 1391(e) does not authorize jurisdiction or venue in damage suits against federal officers sued in their individual capacities, citing *Relf* v. *Gasch*, 167 U.S.App.D.C. 238, 511 F.2d 804, 807 n. 15 (1975) and *Paley* v. *Wolk*, 262 F.Supp. 640, 643 (N.D.Ill.1965), *cert. denied*, 386 U.S. 963, 87 S.Ct. 1031, 18 L.Ed.2d 112 (1967).

In *Relf* v. *Gasch*, *supra*, plaintiffs sought to mandamus a district judge in the District of Columbia to prevent a transfer of a lawsuit from Washington, D.C. to Alabama. The underlying suit was against federal officials residing in Washington. The Court of Appeals granted the mandamus, finding that venue would not exist in Alabama under § 1391(e), by holding that § 1391(e) was inapplicable where damages were sought against defendants as individuals. The only authority the Court gave for this proposition was *Paley* v. *Wolk*, *supra*.

In *Paley* v. *Wolk*, *supra*, plaintiff claimed that federal patent officers were involved in a "confidence game" to pocket plaintiff's patent application fees. The court concluded that the action arose out of essentially private acts for

private gain, that the wrongful acts were not done in the course of the defendant's duties, and that § 1391(e) did therefore not apply. 262 F.Supp. at 643.

With due respect, this Court believes that the *Relf* decision is insupportable in light of the language of § 1391(e), the legislative intent discussed *supra*, and the *Paley* case. *Paley* simply tracks the language of § 1391(e), holding that the subsection is available only when acts complained of are performed "under color of legal authority". The acts complained of in *Paley* were found not to be performed "under color of legal authority". In *Relf, however*, as here, it is clear that plaintiffs were complaining of precisely such acts as are covered by the terms of § 1391(e). See Hart and Wechsler, *supra*, at 1388; S.Rep., *supra*, at 3. Contrary to defendants' contentions and *Relf*, § 1391(e) does not exclude all damage actions against officers sued individually. It excludes damage actions against officers sued individually when those acts are not accomplished under color of legal authority—i. e., when the acts complained of are private acts accomplished for private gain.[15] This reading fully conforms to the congressional intention in passing § 1391(e), which was to facilitate suits seeking redress against the misuse of governmental power.

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15. *See, e.g., Griffith* v. *Nixon*, 518 F.2d 1195 (2d Cir. 1975), dismissed for lack of jurisdiction because the acts complained of were, like those in *Paley* v. *Wolk, supra*, private acts done for private gain. This distinction is made in other areas of the law relating to public officials. *See, e.g., United States* v. *Ehrlichman* 546 F.2d 910, 921 (D.C.Cir.1976) where the court stated:

> There is no violation of Section 242 [42 U.S.C. § 242], however, if a sheriff and his deputies commit a murder for purely personal, non-governmental reasons. The state can, and should, deal with such crime. Section 242 comes into play only if the object of the murder . . . [arose from some] purpose stemming from the official position of those committing the homicide.

Under the defendants' theory, the portions of the Senate and House reports which specifically place damage actions within the reach of § 1391(e) are meaningless.[16] The only actions they believe that language contemplates are actions

> such as those against tax collectors which are against the government official in his "personal" capacity, not his official capacity . . . since otherwise they would be barred by the doctrine of sovereign immunity.

Reply memorandum of defendants Colby, Schlesinger, Cushman and Walters, at 10. However, the legislative history specifically removes actions against tax collectors from the reach of § 1391(e):

> The committee also approved an amendment to section 2 of the bill providing that the provision with respect to venue should apply only to the extent that is not otherwise provided by law. Examples of such proceedings covered by this provision are proceedings with respect to federal taxes.

S.Rep.No.1992, *supra*, 4; U.S.Code Cong. and Adm.News, *supra*, at 2787. Defendants have not suggested damage actions other than the clearly-excluded tax refund actions to which Congress might have been addressing itself.

In essence, defendants attempt to break down the fiction which authorizes both injunctive relief and damages against federal officers when such relief would not be available against the United States. As Defendant Helms puts it:

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16. "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."

H.Rep.No.536, 87th Cong., 1st Sess., at 3; S.Rep.No.1992, 87th Cong., 2nd Sess., at 3.

> Plaintiffs would have this Court believe that a suit against a defendant "individually" is the *equivalent* of a suit against that defendant for actions "under color of legal authority." This contention defies common sense and English usage. Plaintiffs themselves admit that Section 1391(e) covers only suits which would otherwise be unconsented suits against the sovereign, but which are maintainable against Federal officials as nominal defendants through a "fiction". But, a suit against a former officer, seeking damages from his personal estate, is the very antithesis of a suit against the Government. Thus Plaintiffs' own analysis of Section 1391(e) proves the inapplicability of the provision here.

To the contrary, permitting damage suits against officers "individually" for harm resulting from actions accomplished under color of the government's legal authority tracks precisely the methodology adopted in *Ex Parte Young, supra,* and subsequent cases. Such suits enable citizens to remedy harms to them and to deter government officials in the future from misusing the legal authority entrusted to them. The legislative history of § 1391(e) is replete with reference to precisely these concerns. The result is not inequitable. If defendants can establish a good-faith defense, it will be available to them. However, should they be unable to establish such a defense, it would be a serious injustice to throw up hurdles against a lawsuit in a single, convenient forum which Congress has authorized as a "readily available, inexpensive judicial remed[y] for the citizen who is aggrieved by the workings of government" S.Rep.1992, *supra,* at 3.[17]

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17. Defendant Cotter argues that there is no need to look to the legislative history of § 1391(e) because the statute is clear on its face. He contends that resort to the legislative history, and an attempt to construe the subsection in light of Congressional intent, is particu-

3. *Section 1391(e) Applies to Former Officials*

[8] As a critical portion of their argument to avoid the Court's jurisdiction, defendants who were employed by the United States in the past, but who were no longer employed by the United States at the time they were served with process in this suit,[18] maintain that § 1391(e) does not apply to former federal officials but only to officials who were employed by the United States at the time they were served with process in this suit. The arguments they make persuaded Judge Renfrew, in a similar case involving many of the same defendants, to hold that § 1391(e) applied solely to present, not former, officials. *Kipperman* v. *Mc Cone,* 422 F.Supp. 860, 876-77 (N.D.Cal.1976).

Judge Renfrew began by noting that the plain language of the statute denotes "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority." The court then pro-

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larly inappropriate since the "literal" reading he offers will, he asserts, leave plaintiff with appropriate forums for this lawsuit in the Southern District of New York, the site of the mail openings, and the Eastern District of Virginia, headquarters of the CIA. Whether or not jurisdiction over all defendants would exist in those forums now, it is relevant in deciding what Congress intended by passing § 1391(e), that when § 1391(e) was enacted, this lawsuit could not have been brought in either of them. *See* 28 U.S.C. § 1391(b) (1962 ed.). Although courts have disagreed about the proper construction of § 1391(e), they have been virtually unanimous in agreeing that the statute is not clear on its face, and required a resort to legislative history. *See e.g., Natural Resources Defense Council* v. *TVA,* 459 F.2d 255, 257-59 (2d Cir. 1972); *Powelton Civil Home Own. Ass'n.* v. *Department of Housing and Urban Development,* 284 F.Supp. 809, 833 (1968).

18. Those defendants are Raborn, Carter, Taylor, White, Bissell, Karamessines, Angleton, Hood, Rocca, Osborn, Murphy, Day, O'Brien, Watson, Blount, Klassen, Cotter, Gray, Mitchell, Bundy, and O'Brien. Defendant Kirkpatrick is a former official but is a resident of Rhode Island. Defendants Helms, Schlessinger, Colby, Meyer, Ober, Walters and Kelley are, or were at the time they were served, employees of the United States.

ceeded to the legislative history which it found decisive, suggesting "no intent on the part of Congress to include former officials among those subject to suit under Section 1391(e)". *Id.* at 876. As Judge Renfrew read the legislative history, only those individuals subject to mandamus—present officials—would fall within the scope of the subsection. He found it "inconceivable that Congress would so substantially broaden the venue provision applicable to every individual once employed by the federal government without comment". *Id.*, at 877.[19]

The *Kipperman* court's decision regarding the reach of § 1391(e) is squarely in conflict with the decision in *Lowenstein* v. *Rooney*, 401 F.Supp. 952 (S.D.N.Y.1975). Lowenstein sought declaratory and injunctive relief and damages from various present and former officials for their alleged improper and unlawful conduct toward him, consisting of, *inter alia*, improper investigations, and a politically motivated IRS investigation. In response to the motions of various defendants to dismiss because § 1391(e) did not apply to former officials, the court canvassed the legislative history of § 1391(e), and then stated:

> The actions complained of by the plaintiff clearly were committed "under color of legal authority". To assert that because the defendants are no longer in government service the plaintiff may not utilize section 1391(e)—a section clearly intended to permit such actions—would as plaintiff contends, defeat the purposes of the statute. If the defendants desire to invoke official immunity, they may do so directly. *Lowenstein* v. *Rooney, supra*, at 962.

This Court is persuaded that the holding of *Lowenstein* more fully conforms to the policies behind the adoption of

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19. In *Wu* v. *Keeney*, 384 F.Supp. 1161 (D.D.C. 1974), a damage action where jurisdiction was based on § 1391(e) was dismissed solely on this ground.

the broadened venue and service provisions of § 1391(e) than the holding in *Kipperman*.

First, the reasoning urged by defendants would permit an official to defeat an action against him for illegal acts accomplished under color of legal authority merely by resigning his position. *See Lowenstein* v. *Rooney, supra*, at 961.[20] And such reasoning creates its own difficulties with regard to officials who, while still in government service, have changed jobs.

Second, it seems clear that Congress intended by § 1391 (e) to facilitate private suits for redress of governmental action. Yet defendants' construction would require plaintiffs seeking relief to maintain multiple lawsuits in widely scattered jurisdictions, each involving the same facts and issues. That result seems at odds with the Congressional intent in enacting Section 1391(e), "a plaintiff's provision", *Powelton Civil Home Owners Ass'n.* v. *Dept. of Housing and Urban Dev., supra* at 833.

The final reason advanced by defendants against reading § 1391(e) as applying to former officials is that it would unduly burden government service. As the *Kipperman* court observed:

> The construction urged by plaintiff would potentially subject a retired government official to suit in any federal court in the country . . . The Court finds it inconceivable that Congress would so substantially broaden the venue provision applicable to every individual once employed by the federal government without comment. *Kipperman* v. *McCone, supra*, at 877.

However, since it is undisputed that Congress subjected *present* government officials to suit in any federal court

20. Plaintiff points out that defendant Cotter resigned the same month this lawsuit was filed.

under § 1391(e), it is necessary to determine exactly how much of an added burden the construction proferred by plaintiffs would place on retired officials. The Court must ascertain the Congressional intention in § 1391(e). If the plaintiff's construction would entail a significant added burden on government service, that would be persuasive reason to conclude that Congress would not have taken such a step without comment.[21]

The Court has examined defendants' arguments and fails to perceive any significant burden of federal service *added* by construing § 1391(e) to apply to former officials. Certainly personal liability itself is not such an added burden, since government service is already burdened with personal liability beyond the reach of official immunity. *See, e. g., Halperin* v. *Kissinger,* 424 F.Supp. 838 (D.D.C.1976). Neither Congress nor the courts have found that subjecting government officials to such liability impedes the proper functioning of the government. To the extent that such liability deters wrongful acts, that of course is its purpose. Nor does the Court believe that able men and women would be deterred from entering federal service if their liability were not terminated by their withdrawal from the government. Few men or women know how long they will be in government service when they enter: the interest in cutting off liability is served by statutes of limitations, which fairly mitigate such burdens as exist for all officials, in or out of government.

Nor does the Court find significant added burdens on federal service in defending such lawsuits. As plaintiff

21. For example. Defendant Bundy contends that construing § 1391(e) to include former government officials would "be patently unfair and would impose an impossible burden on government service". Bundy Memorandum at 10. He argues that plaintiff's construction would deter able men from entering federal service. Id. at 13.

points out, the principal burden of defending any lawsuit is the expense of counsel. But it seems to be undisputed that it is the policy of the Justice Department to defend lawsuits against present and former officials by citizens claiming redress for actions accomplished under color of legal authority. The record here shows that the Justice Department has retained private counsel to represent each of the defendants.[22] Indeed, this palpable manifestation of the continuing relationship between the government and its former officials strengthens plaintiffs' argument, and demonstrates the continuing responsibility which the United States bears for acts committed under color of law by persons formerly in the service of government. As for other burdens of defending the lawsuit, apart from counsel and ultimate liability, it is clear that these are insignificant. By far the greatest portion of effort required in defending this lawsuit will not require defendants to travel or undertake other actions interfering with their ongoing activities.

Since the Court cannot find significant burdens placed on former employees in defending lawsuits such as these under government expense, other than those burdens which employees of the government are all aware they face (i.e., liability for wrongful acts accomplished by misuse of official power), it agrees with the *Lowenstein* court that the proper construction of § 1391(e) renders it applicable to present and former officials alike.

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22. A press release issued by the Department of Justice on December 12, 1975, and attached to plaintiff's Memorandum in Opposition to Defendants' Motions to Dismiss the Complaint, states:

> The Department . . . usually would represent all the present and former employees for actions they took while federal officials.

Since the Department has been conducting a criminal investigation of the mail-opening program, representation of these defendants would have created a conflict of interest, and the government decided instead to retain private counsel for each of the defendants here.

Venue under Section 1391(e)

[9] The arguments defendants make concerning § 1391 (e)'s inapplicability to damage actions against former officials apply to venue as well as to personal jurisdiction. Since the Court holds that § 1391(e) authorizes the exercise of personal jurisdiction in light of the allegations in the complaint, it necessarily holds that § 1391(e) supplies venue as well.[23]

Specificity of Allegations

[10] Various defendants contend that the complaint fails to allege specific facts connecting them with Rhode Island. The case they rely on, *Socialist Workers' Party* v. *Attorney General of the United States*, 375 F.Supp. 318 (S.D.N.Y. 1974) holds that New York's long-arm statute requires a plaintiff suing an out-of-state defendant under a conspiracy theory to allege "definite evidentiary facts" connecting the defendant to transactions occurring in New York to subject him to New York jurisdiction. *Id.* at 322.

Since the Court holds that Rhode Island's long-arm statute provides no limitation on the court's exercise of jurisdiction over defendants sued pursuant to § 1391(e), the *Socialist Workers* case is inapposite. Plaintiffs have pleaded the only forum-related activity which they must plead to establish personal jurisdiction: activity within the forum, i. e., the United States.

To the extent that defendants contend that the complaint fails properly to allege sufficiently specific facts regarding

23. Plaintiffs have also sought to ground jurisdiction on Rhode Island's long-arm statute, Section 9-5-33, Rhode Island General Laws (1956), basing venue on 28 U.S.C. § 1391(b). However, since the Court has found jurisdiction and venue for all plaintiffs under 28 U.S.C. § 1391(e), and since Rhode Island's long-arm statute could ground jurisdiction at most for plaintiff Driver, the Court does not reach these issues.

acts of defendants which have harmed plaintiffs, a different question is presented.[24] The Court has already indicated its intention to entertain motions under Rule 12(b)(6) at a later date.

Motion to Dismiss of Defendant Kelley

[11] Plaintiffs seek injunction "enjoining the defendants from engaging in the activities declared to be illegal and unconstitutional" against Defendant Clarence Kelley, the Director of the Federal Bureau of Investigation, and

> A mandatory injunction or writ of mandamus ordering the defendants to produce before this Court for destruction, all files, reports, records, photographs, data computer tapes and cards, and all other materials derived from defendants' illegal and unconstitutional activities relating to plaintiffs and all other persons similarly situated. (Prayer for Relief C. 2nd Amended Complaint)

Defendant moves to dismiss on grounds of mootness, claiming that the challenged operation was terminated in 1973. They rely on an affidavit of Vernon A. Walters and on the Report to the President by the Commission on CIA Activities Within the United States (hereinafter "the Rockefeller Report").

It is clear that the plaintiffs' claim for mandatory injunctive relief, at least, is very much alive, and that Defendant Kelley is the only defendant against whom such

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24. The court in *Kipperman* v. *McCone*, 422 F.Supp. 860 (N.D.Cal.1976) seems to have considered the Rockefeller Report as a source of "definite evidentiary fact" for the purpose of ruling on preliminary jurisdictional motions. This court does not decide now whether or not it may consider the Rockefeller Report of the Select Committee in ruling on whether or not plaintiffs have sufficiently stated a claim against particular defendants in order to survive a Rule 12(b)(6) motion to dismiss.

relief could be awarded. They contend that copies of their first-class mail, opened by defendants, remain in FBI files. If true, that would amount to a continuing, real and substantial controversy with Defendant Kelley. The action is therefore not moot. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937). *See also DeFunis* v. *Odegaard*, 416 U.S. 312, 318, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). The motion to dismiss of Defendant Kelley is denied.[25]

Interlocutory Appeal

[12] Finally, it seems apparent that the Court's resolution of the difficult jurisdictional questions before it involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. As the opinion demonstrates, various federal courts have come out on different sides of nearly every issue regarding the reach of § 1391(e) faced by this Court. Furthermore, if the Court's resolution of these questions is mistaken, in all likelihood this action would be terminated in this Court. The Court therefore makes the certification required by 28 U.S.C. § 1292(b) as to the denial of the motions to dismiss of all the defendants except for Clarence Kelley and the United States.

25. Plaintiff also claims that injunctive relief might well be appropriate even if the mail opening program has ended. While injunctive relief is normally predicated only on a threat of imminent irreparable harm, it has been held that in extraordinary cases egregious past harm, as to which the danger of repetition has not been removed, and which continues to have serious repercussions in the community, warrants the grant of injunctive relief. *Lankford* v. *Gelsten*, 364 F.2d 197, 204 (4th Cir. 1966). *See also Rizzo* v. *Goode*, 423 U.S. 362, 373 n. 8, 96 S.Ct. 598, 46 L.Ed2d 561 (1976). Since the Court finds the case not moot as to Defendant Kelley on other grounds, it need not consider whether the very serious acts complained of here meet the *Lankford* test.

Class Action

[13] Plaintiffs, who seek declaratory and injunctive relief and money damages, move the Court to certify a class composed of

> [A]ll United States citizens and residents whose first-class letters, written and sent by or to them, either from within or destined for the United States, were unlawfully opened, read and photographed by employees of the Central Intelligence Agency, acting in concert with employees of the United States Post Office Department, the United States Postal Service, the Federal Bureau of Investigation, the Department of Justice, and other government agencies resulting in the unlawful collection, maintenance and dissemination of files relating to them.

Defendants oppose class certification on a variety of grounds. At the threshold, they object to the conclusory terms in which the class is defined—those whose mail has been "unlawfully" opened, read, and photographed. In view of the fact that the same representation can be achieved by a class composed of "those whose mail has been opened, read, and photographed in connection with the East Coast Mail Intercept Program", the Court sustains defendants' objection; plaintiffs are directed to modify the definition of the proposed class accordingly.

[14] In addition to problems raised by defendants, the Court has its own liminal problems with the class as currently defined. It became clear at the hearing held on this matter that beneath the surface of the broad class that plaintiffs seek to represent there exist two well-defined subclasses. On the one hand, there are those persons whose mail was, according to the Rockefeller Report, opened, photographed or otherwise tampered with on a purely random

basis. This sub-class apparently numbers in the tens of thousands. *See* Rockefeller Report 105. On the other hand, there is a smaller group, consisting of different individuals over the years, but averaging about three hundred persons at any one time, *see* Rockefeller Report 105. This sub-class is composed of persons on the so-called "watch-list", individuals of particular interest to one or more of the nation's intelligence bodies whose mail was the object of special scrutiny. See id. at 105, 111. The two groups are in markedly different positions. By definition, the watch-list sub-class had its mail surveilled for some reason, although what the reason was in each case remains to be seen. The random sub-class, on the other had, had its mail inspected for reasons of pure chance. Whether the different positions of the two groups will have any legal significance, the Court cannot now say. It is clear, however, that there are significant practical differences between the two groups, in terms of litigating this case. For example, defendants have already indicated that they believe that they had probable cause to inspect the mail of the persons on the watch-list. Proving this claim could involve extensive discovery by defendants, involving depositions from each watch-listed class member. It could also involve the presentation of an individual defense against each such person. By contrast, the "probable cause" defense would obviously be unavailable with respect to persons whose mail was randomly opened. In view of these differences between the two groups, the Court deems it appropriate that the class be divided into two sub-classes, composed of the random group and the watch-list group respectively.[26] *See* Fed.R.Civ.P.

26. Because the decision to create sub classes is made on the Court's own motion and only after the hearing on class determination, the Court has not been informed whether named plaintiffs fall into the random sub-class, the watch-list sub-class or both. This information

23(c)(4)(B); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 184-85, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Douglas J., dissenting in part). Rule 23(c)(4) requires the Court, once such a division has been made, to construe and apply the remaining provisions of Rule 23 accordingly. It is to that task that the Court now turns.

A. *The Requirements of Rule 23(a)*

Rule 23(a) provides:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[15] As to the random sub-class, the Court has no difficulty in finding that the requirements of Rule 23(a) are satisfied. The class of persons whose mail was randomly opened numbers in the tens of thousands, *see* Rockefeller Report 105. The claims of plaintiffs (that their mail was randomly opened in violation of the fourth amendment) as well as the defense (that the mail intercept program was undertaken reasonably and in good faith) are typical class wide. The mail intercept program, as a whole, raises common questions of fourth amendment law that do not vary

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should be furnished to the Court without delay, by stipulation or otherwise. It will be necessary that at least one plaintiff be a member of each sub-class before an order of certification can issue. *See Sosna* v. *Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

perceptibly according to which random class member raises these questions. Further, there is no doubt that plaintiffs' attorneys from the American Civil Liberties Union are amply qualified to carry this action forward as a class action, thus assuring "adequacy of representation" in one sense of that term, *see Cullen* v. *United States*, 372 F.Supp., 441, 447-48 (N.D.Ill.1974).

[16] However, "adequacy of representation" also means that "the interests of the representative party must coincide with those of the class", *Mersay* v. *First Republic Corp.*, 43 F.R.D. 465, 469 (S.D.N.Y.1968). It has been suggested by one of the defendants that this requirement is not met in the present case because some persons whose mail was monitored might regard the East Coast Mail Intercept Project as entirely reasonable and in the national interest. This assertion, if true, is irrelevant to the question of whether this action may be maintained as a class action. *See Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968). If the relief sought in this case would adversely affect tangible interests of some proposed class members it might be argued that plaintiffs were not adequate representatives of the class. *See, e. g., Dierks* v. *Thompson*, 414 F.2d 453, 456 (1st Cir. 1969); *Burns* v. *United States Postal Service*, 380 F. Supp. 623, 629 (S.D. N.Y.1974). However, such an argument cannot be based on mere speculation as to what some class members might regard as sound national policy, and the Court finds that plaintiffs provide the adequacy of representation for the interest of the proposed sub-class that is required by Rule 23(a).

[17] The issues posed by the question whether the watch-list sub-class meets the requirements of Rule 23(a) are somewhat different. There is no problem as to numeros-

ity. Although the total number of persons on the list over a twenty-year period has not been ascertained, the average number of persons on the list at any given time was about 300, *see* Rockefeller Report 106, a number in itself sufficient to render joinder impracticable. *Cf. Cullen* v. *United States*, 372 F.Supp. 441, 447 (joinder of 325 persons clearly impracticable). As to adequacy of representation, the Court's earlier remarks *a propos* the random sub-class apply to the watch-list sub-class with equal vigor, and the Court finds adequacy of representation as to that group.

The more difficult question is whether any of the named plaintiffs present claims that are typical of the class and raise issues involving common questions of law or fact. Basically, defendants contend that the legality of the surveillance of watch-listed persons depends on the particular facts of each case, as those facts shed light on the reasonableness of each intercept. Such individualized determinations, defendants argue, are the very antithesis of the typicality and common questions required by Rule 23(a). This argument does not really address plaintiffs' theory of the case.

In plaintiffs' view, a warrantless surveillance of *any* first-class mail for intelligence purposes is presumptively illegal under *any* circumstances. If this view is correct—and now is not the time to make a judgment on that point, *see Yaffe* v. *Powers*, 454 F.2nd 1362, 1366 and n. 2 (1st Cir. 1972); *Fogel* v. *Wolfgang*, 47 F.R.D. 213, 215 n. 4 (S.D.N.Y. 1969)—than plaintiffs are also correct in asserting that the myriad targets of the intercept program have a unitary claim whose validity is dependent upon a single question of law. Should it become clear that plaintiffs' view of the law will not prevail the sub-class can be modified or dismissed. *See Yaffe* v. *Powers*, 454 F.2d at 1367. For the present, the Court finds that the requirements of typicality and com-

monality, as well as numerosity and adequacy of representation are present with respect to the watch-list subclass.

B. *The requirements of Rule 23(b)*

[18] In addition to the requirements of Rule 23(a), plaintiffs must satisfy one or more of the requirements of Rule 23(b) in order to obtain class certification. It is plaintiffs' position that the instant action may be maintained under any of the following provisions of Rule 23(b):

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or . . .
>
> . . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

> already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

While disputing generally that the requirements of any portion of Rule 23(b) have been met, defendants urge in particular that plaintiffs cannot properly bring this action under Rule 23(b)(2) since, in addition to injunctive relief, plaintiffs seek money damages in excess of $1 billion and Rule 23(b)(2), by its terms is applicable only to claims for "final injunctive or corresponding declaratory relief." Without disputing plaintiffs' contention that "incidental" monetary relief can be given in conjunction with injunctive or declaratory relief under Rule 23(b)(2), it seems to the Court beyond dispute that plaintiffs' attempts to impose substantial financial liability on defendants cannot fairly be characterized as "incidental." *See, e. g. Robertson* v. *National Basketball Association,* 389 F.Supp. 867, 900 (S.D. N.Y.1975); Advisory Committee's Notes to Rule 23, 39 F.R.D. 98, 102 (1966).

[19] However, this is not to say that a claim for class-wide injunctive relief should be denied merely because it is coupled with a claim for a money judgment, however substantial. In order to preserve injunctive relief, the better course, in this Court's view, is to certify the declaratory and injunctive claims for class-wide relief under Rule 23(b)(2) if the requirements of that rule and of Rule 23(a) are met and then consider as a separate matter whether the claims for money damages can be maintained under Rule 23(b)(1) or Rule 23(b)(3). See 3B Moore's Federal Practice ¶ 23.45 [1] at 708-09.

In the present case, it is clear that if plaintiffs prevail on the merits and satisfy the other requirements for decla-

ratory and injunctive relief, such relief can be appropriately granted on a class-wide basis, both with respect to the watch-list sub-class and the random sub-class. As to the random sub-class, such relief, if it is to be granted to any member of the group, should be granted to all, since the very definition of the sub-class belies any individual differences among its members and defendants' decision to institute random mail surveillance was based on the common factor of the destination of the mail surveilled rather than upon any particularizing characteristics of individual addresses.

As to the watch-list sub-class, defendants claim to have acted on the basis that surveillance of persons in that group was reasonably justified. Should that assumption prove erroneous *in toto*, class-wide relief will be appropriate. Should the assumption be upheld in its entirety, defendants will be entitled to a judgment in their favor running against the sub-class as a whole. If the validity of defendants' "reasonableness" standard must be tested on a case-by-case basis, the sub-class can be dismissed as improvidently certified. *See, e. g. City of Philadelphia* v. *Emhart Corp.*, 50 F.R.D. 232, 235 (E.D.Pa.1970). At this juncture, the common thread of "reasonableness," generally applicable to the entire sub-class, is sufficient to permit certification of the watch-list sub-class under Rule 23(b)(2) for purposes of seeking declaratory and injunctive relief.[27]

[20] It remains to be determined whether plaintiffs' claims for money damages are amenable to class treatment.

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27. Defendants have argued that appropriate injunctive relief may be framed in this case without certifying a class. *See e. g., District of Columbia Podiatry Society* v. *District of Columbia*, 65 F.R.D. 113 (D.D.C.1974). This Court, however, will follow what it regards as the better rule, that, at least in civil rights cases, certification for purposes of injunctive relief is appropriate wherever the requirements of Rule 23 have been met. *See, e. g., Fujishima* v. *Board of Education*, 460 F.2d 1355, 1360 (7th Cir. 1972).

More precisely, the Court must consider whether plaintiffs can maintain a class action on the issue of liability for money damages, for the Court rejects at the outset plaintiffs' contention that the actual assessment of damages to individual class members can be tried on a class-wide basis. As defendants accurately point out, the gravamen of plaintiffs' damages claim is that the privacy of persons whose mail was monitored has been violated. How much compensation, if any, such persons are entitled to is necessarily a matter that the jury must assess on a case by case basis, assessing the harm done in each case. Plaintiffs' suggestion that a dollar amount can be arbitrarily assigned as compensation for each letter opened or photographed cannot be accepted. *Dellums* v. *Powell,* No. 1022-71 (D.D.C.), *appeal pending,* a case cited by plantiffs in which classwide damages for constitutional violations were awarded, did not involve the uniquely subjective claims of privacy that are implicated when, as here, a fourth amendment violation is claimed.

In deciding the question of whether a class action on the issue of liability can be maintained by either of the subclasses, a threshold problem arises that is not present if the claims for relief were limited to declaratory and injunctive relief.

The problem, although identified by defendants as related to the question of whether plaintiffs' claims are typical of those of the class sought to be represented, might also be described as one of standing. To the extent that plaintiffs seek class-wide declaratory and injunctive relief, there can be little doubt as to their standing. Plaintiffs allege that they and all other class members have been the victims of a government program that has violated their constitutional and statutory rights and seek a declaration that the program was illegal, an injunction against its continuance, and

a mandatory order that the files kept as a result of the program be destroyed. Insofar as this relief can be obtained from the present governmental officials who are parties to this suit, it is clear that plaintiffs have standing to seek this relief on behalf of the class. The harm that the named plaintiffs allege is the same as that of the two subclasses generally: it is the threatened continuation of the program and the continued existence in government files of the information gleaned by the program.

The claims on liability for money damages stand on a somewhat different footing.[28] Plaintiffs seek money damages on behalf of the class from each of the officials responsible for the mail intercept program throughout the twenty year period of its existence even though their own individual mail was only allegedly tampered with during a part of that period. The question is thus raised as to how plaintiff Driver, for example, whose mail was allegedly opened in 1965 and 1969, can have standing to seek damages from defendant Schlesinger, for example, whose involvement in the intercept program, by plaintiffs' own allegations, did not begin until after 1970; or against defendant Bissell, whose tenure with the CIA extended from 1959 only until 1962. Courts have resolved this question in various ways, some holding that class representation is not possible under such circumstances, *see, e.g., Weiner* v. *Bank of King of Prussia*, 358 F.Supp. 684 (E.D.Pa.1973); *see also La Mar* v. *H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973) (lack of typicality). On the other hand, at least one court

28. It is not clear from plaintiffs' complaint whether they seek an injunction against former CIA, FBI, and post office personnel or a declaration that these former officials' conduct was illegal. If such relief is indeed sought, it raises the same standing problems as does the claim for monetary relief and the Court's discussion of that point applies equally to claims for declaratory and injunctive relief against former officials.

has held that a class action is maintainable even where plaintiffs would be unable in their own right to bring an action against all of the defendants. *Haas* v. *Pittsburgh National Bank*, 60 F.R.D. 604, 611-614 (W.D.Pa. 1973).

This Court need not attempt to resolve these conflicting positions, since it appears that the rule that one or more of the named plaintiffs must individually have a cause of action against each named defendant in order for a class action to be maintained does not apply to "situations in which all injuries are the result of a conspiracy" or to "instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *La Mar*, 489 F.2d at 466.

[21] In the Court's opinion, plaintiffs' complaint fits both branches of the *La Mar* exception. Plaintiffs' complaint alleges a massive and concerted program of covert mail intercepts over a twenty-year period, the maintenance of on-going files based on information gleaned from the intercepts, and a conspiracy to conceal the existence of the entire operation. The officials and former officials named are, moreover, juridically related in that they are all past and present federal officials whose duties included oversight either of foreign or domestic intelligence gathering or the proper delivery of the U. S. Mail. These considerations fit the present complaint easily within the *La Mar* exception. *See also Washington* v. *Lee*, 263 F.Supp. 327, 330-31 (M.D. Ala.1966) (plaintiffs segregated by race in one county jail can represent class of similarly situated persons in all county jails throughout state). Accordingly, the Court holds that named plaintiffs who are members of the two sub-classes have standing to raise the claims of the members of their respective sub-class against former officials whose tenure does not correspond to the dates of the individual mail openings alleged by any of the named plaintiffs.

The Court now turns to the question of whether a class-wide claim that defendants' conduct has rendered them liable in damages fits either of the two remaining sections of Rule 23(b) suggested by plaintiffs.

It seems clear that Rule 23(b)(1)(A) cannot apply to the liability claim. Assuming that Rule 23(b)(1)(A) is applicable to claims for damages, a question not free from doubt, *see, e.g., Kristiansen* v. *John Mullens & Sons, Inc.*, 59 F.R.D. 99, 105 and n. 6 (E.D.N.Y. 1973); *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 415 and n. 5 (S.D.N.Y. 1972); *but see Berman* v. *Narragansett Racing Association*, 48 F.R.D. 333, 337 (D.R.I.1969) (by implication) the rule is inapposite to the present facts. The plaintiffs argue that Rule 23(b)(1)(A) certification is necessary to establish compatible "standards of conduct for the party opposing the class." However, the Court's decision to certify the sub-classes under Rule 23(b)(2) for class-wide injunctive relief has accomplished this for it will necessarily mean that a class-wide adjudication will be forthcoming (unless the class is de-certified) that will establish a standard of conduct to be observed by defendants in the future and will preclude any need for the establishment of such a standard by means of a damages action under Rule 23(b)(1)(A).

There remains Rule 23(b)(3). In order for plaintiffs to maintain a class action on the issue of liability on behalf of either sub-class, the Court must find that common questions of law and fact predominate over individual questions and that "a class action is superior to other available methods for the fair adjudication of the controversy." Rule 23 (b)(3).

[22] Insofar as plaintiffs seek a class-wide adjudication of defendants' liability on behalf of the random sub-class, there is little doubt that such treatment is warranted. The Court has already determined to make a class-wide adjudi-

cation of the legality of the intercept program under Rule 23(b)(2). Adjudication of the issue of liability will add only the element of any good faith or other defense that defendants choose to raise. Since the random sub-class members are completely fungible, having been selected by chance and the accident that they all corresponded with persons in the Soviet Union, it cannot be said that the validity of any defenses raised will vary from individual to individual, or that any individual class member will have any special interest in controlling his or her individual litigation. Judicial economy, the prevention of multiple lawsuits, the absence of any substantial difficulty in concentrating this litigation in this forum—all of these factors lend additional support to the Court's conclusion that defendants' liability to the random sub-class should be adjudicated as a class action.

[23] Application of the Rule 23(b)(3) criteria to the watch-list sub-class leads to a quite different conclusion. Defendants have made it clear that they plan to defend against liability for the mail surveillance of watch-listed persons on the grounds that they reasonably believed that each such surveillance was proper. When the Court considers the extensive pre-trial discovery and trial testimony that such a defense will entail, it must conclude that the question of the manageability of such a class action raised by defendants is no mere spectre, and poses serious problems that render class action certification of the watch-list sub-class on the question of defendants' liability inappropriate at this time.[29]

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29. Two reasons dictate a different result concerning certification under Rule 23(b)(3) of a class action an behalf of the watch-list subclass with respect to the issue of liability than was reached with respect to certification under Rule 23(b)(2) for the claims for declaratory and injunctive relief. First, the "good-faith" defense,

C. *Notice*

[24] Because the liability issue in this case will proceed as a Rule 23(b)(3) class action on behalf of the sub-class of persons whose mail was randomly photographed, opened, or inspected in connection with the East Coast Mail Intercept Program, notice to members of the sub-class is required by Rule 23(c)(2). This notice must include individual notice to sub-class members if the addresses of the individuals are available through reasonable effort. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Whether the addresses are available in the present case can only be determined after discovery proceedings, and the Court will enter an appropriate order regarding notice at that time. It should be noted that whatever notice is ordered must be at plaintiffs' expense. *Id.* at 178-179, 94 S.Ct. 2140. Plaintiffs' contention that the government should bear the cost of notice in this case cannot be sustained under *Eisen*. While the *Eisen* Court left open the possibility that defendants may be made to bear the cost of notice where there exists a fiduciary relationship between plaintiff and defendants, plaintiffs have not established that such a relationship exists between plaintiffs and defendants in the present case.

[25] One final comment is in order. Defendants, citing *Berlin Democratic Club* v. *Rumsfeld*, 410 F Supp. 144 (D.D.C.1976), argue that maintenance of a class action in this case will lead to endless procedural battles over dis-

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with its concomitant problems is obviously not available insofar as the relief sought is declaratory and injunctive. Second, and controlling, "the existence of 'predominating' questions and the availability of other methods of resolution which might be superior to a class action are not criteria of a subdivision (b)(2) class, but . . . of a (b)(3) class . . . ." *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

covery and impermissible inquiries into the nature and scope of intelligence activity. The latter objection, whatever its validity in other cases, is inapplicable to the present case, where the East Coast Mail Intercept Program is already a matter of detailed public knowledge due to the publication of the Rockefeller Report and the Report of the Select Committee. The existence of those reports should also preclude many objections to discovery that might otherwise be made. In any case, plaintiffs here have raised a class-wide claim for injunctive and declaratory relief that they seek to certify under Rule 23(b)(2) as well as claims for class-wide damages under Rule 23(b)(3). While considerations of undue publicity might conceivably have some bearing on the determination the Court must make under Rule 23(b)(3) as to whether a class action is superior to other modes of adjudication, no such determination is authorized under Rule 23(b)(2). Since the same information will undoubtedly be sought in discovery whether the relief sought is injunctive and declaratory only or is coupled with claims for money damages, defendants' objections on grounds of undue publicity must be rejected.

To summarize, the Court finds that plaintiffs' proposed class of all United States citizens whose mail was unlawfully opened, read, and photographed must be amended to avoid the conclusory term "unlawfully," that the class must be divided into sub-classes composed of those persons whose mail was opened, read, and photographed randomly and those persons whose mail was opened, read, and photographed based on their presence on the watch-list, that at least one named plaintiff must be a member of each subclass, that a class action may be certified as to both subclasses under Rule 23(b)(2) for purposes of adjudicating the claims for injunctive and declaratory relief, that a class

action on behalf of the random sub-class may be certified under Rule 23(b)(3) for purposes of adjudicating the claim that defendants are liable in damages to the members of that sub-class, that class certification of the liability claims of the watch-list sub-class is inappropriate at this time, and that individual notice of the class action on the issue of liability must be sent at plaintiffs' expense to all members of the random sub-class whose addresses are obtainable through reasonable effort.

Counsel will prepare an order in accordance with this opinion.